United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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No. 19165

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted]

GORDON COUNTY BROADCASTING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

BLUE RIDGE MOUNTAIN BROADCASTING COMPANY, INC.,

Intervenor.

On Appeal From a Decision of the Federal Communications Commission by Its Review Board

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April 19, 1965

QUESTION PRESENTED

Whether the Commission, by its Review Board, erred or was arbitrary and capricious in making findings and conclusions based upon the testimony of a Commission witness which had been rejected in its entirety by the Commission's Hearing Examiner.[1]

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[1] Appellee believes that the following question is also presented:

Whether Gordon County Broadcasting Company is a person aggrieved or whose interests are adversely affected within the meaning of Section 402(b)(6) of the Communications Act.

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*Cases and authorities chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Gordon County Broadcasting Company from a decision of the Federal Communications Commission, by its Review Board, released October 13, 1964, which denied the application of intervenor, Blue Ridge Mountain Broadcasting Company, Inc., for a construction

permit for a new standard broadcast station at Ellijay, Georgia (R. 389-401), on the grounds that intervenor and appellant had participated in a bad faith filing of that application and had made misrepresentations to the Commission. A Notice of Appeal was timely filed with this Court by appellant on February 5, 1965.

The jurisdiction of this Court is invoked under Section 402(b)(6) of the Communications Act of 1934 as amended (47 U.S.C. Sec. 402(b)(6), Section 10 of the Administrative Procedure Act (5 U.S.C. Sec. 1009), and Rule 37 of the Rules of this Court.

STATEMENT OF THE CASE

This appeal is from a decision and order of the Review Board of the Federal Communications Commission released on October 13, 1964, which denied the application of Blue Ridge Mountain Broadcasting Company, Inc., (File No. BP-14942, Docket No. 14647) for a construction permit for a new standard broadcast station at Ellijay, Georgia. The Review Board's decision reversed the initial decision of the Hearing Examiner who had recommended a grant of the Blue Ridge application. The Review Board based its denial of the Blue Ridge application on the grounds that appellant had conspired with Blue Ridge in the planning, preparation, and filing of its application; that the Blue Ridge application was not filed in good faith; that it was filed solely or in part for the purpose of preventing or delaying the granting of a construction permit to Reliable Broadcasting Co., at Calhoun, Georgia; and that the applicant, Blue Ridge, had failed to sustain its burden of proof under the strike application issue in this proceeding. (R. 389-401)[1]

In reaching these conclusions the Review Board relied principally upon the testimony of one Richard Bowman, called as a witness by the

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[1] "R. __ " refers to the record page as renumbered by the Commission.
"Tr. __ " refers to the transcript of the hearing, which was not renumbered.

Commission, a former employee of appellant whose testimony had been entirely rejected by the Hearing Examiner. The Examiner, after observing the demeanor of the Commission's principal witness, concluded that Bowman ". . . displayed a willingness to conform his 'recollection' to what he believed to be independent evidence in corroboration of his testimony"; that ". . . his inventiveness displayed malice . . ."; that "neither quality is calculated to engender confidence in his testimony"; that he showed a "willingness . . . to swear to facts which he believes will aid the cause he has adopted with utter indifference to the truth or falsity of his oath"; that ". . . this is not the mark of a reliable witness," that his testimony was "false," "incredible," "evasive" and "unworthy of belief," and that any attempt to separate the truth from the falsity in Bowman's testimony would be an "exercise in conjecture." The Examiner concluded that "Justice would not be served by permitting the ultimate conclusion herein to rest, even in part, on the testimony of this witness." (R. 273-276) Notwithstanding the fact that no member of the Review Board at any time observed the demeanor of the Commission's witness Bowman, the Board reversed the Examiner's findings as to the credibility of the Commission's witness, and relied principally on his testimony in reaching its decision. (R. 389-401)

Appellant, Gordon County Broadcasting Company, is the licensee of Standard Broadcast Station WCGA, Calhoun, Georgia. The majority stockholders of appellant are Judy D. Magill, and her husband, Robert R. Magill, who is also appellant's president. Intervenor, Blue Ridge, is owned by Joseph M. Acree, his father, J. T. Acree, and Harbin M. King. Joseph M. Acree is now the son-in-law of the Magills, although such relationship did not exist at the time the Blue Ridge application was prepared and filed. Harbin M. King acts as a local attorney for the Magills and is a friend of theirs.

On June 26, 1961, Blue Ridge filed with the Commission an application for a construction permit for a new standard broadcast station at Ellijay, Georgia. (R. 1-58) The application was mutually exclusive

permit for a new standard broadcast station at Ellijay, Georgia (R. 389-401), on the grounds that intervenor and appellant had participated in a bad faith filing of that application and had made misrepresentations to the Commission. A Notice of Appeal was timely filed with this Court by appellant on February 5, 1965.

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On June 26, 1961, Blue Ridge filed with the Commission an application for a construction permit for a new standard broadcast station at Ellijay, Georgia. (R. 1-58) The application was mutually exclusive

with an earlier filed application for the same facilities at Calhoun, Georgia. By Order released on June 25, 1962, the Commission designated the two conflicting applications for hearing along with the application of Radio Canton,[2] for the same facilities at Canton, Georgia. (R. 66-68)

On September 18, 1962, Reliable requested the Commission's Review Board to enlarge the hearing issues in the designated proceeding to include a "strike application" issue against Blue Ridge. This request was based upon an accompanying affidavit dated September 8, 1962, by one Richard M. Bowman, a former employee of appellant, in which Bowman swore that while he was in appellant's employ, the Blue Ridge application was prepared under the supervision of appellant's president and he was told by appellant's president, as well as the president of Blue Ridge, that the Blue Ridge application was being prepared in order to block Reliable's previously filed application. (R. 78-84)

Blue Ridge filed its opposition to the Reliable request on September 28, 1962. (R. 92-110) The Blue Ridge opposition was accompanied by an affidavit of appellant's President, R. R. Magill, which stated that Bowman's charges were utterly false and absolutely without foundation of fact. The Magill affidavit also showed that Bowman had been employed at appellant's Station WCGA, Calhoun, George, at various times between 1954 and 1961 and that Bowman was dismissed by Gordon County on April 14, 1956, because his wages were being garnisheed by his creditors. The Magill affidavit also showed that at some time between July 1, 1961 and October 20, 1961, when Bowman was again in Gordon County's employ, Mr. Magill swore out a criminal warrant charging Bowman with the offense of larceny after trust, which was not prosecuted because Bowman agreed to repay the missing money and did repay part of it. (R. 97-98)

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[2] By order of the Chief Hearing Examiner released September 12, 1962, the application of Canton Radio was dismissed at its request. (R. 77)

The Blue Ridge opposition also was accompanied by an affidavit of one George Hayes which showed that immediately after Bowman had made his allegations against appellant and Blue Ridge to the Commission, on behalf of Reliable, Bowman told Hayes that he was going to work for Reliable. (R. 102-103)

The Blue Ridge opposition also was accompanied by an affidavit of one Harold S. Deaton, an attorney-at-law, which showed that records of the Clerk's office of the Superior Court of Gordon County, Georgia, indicate that during the period from October 19, 1955, through September 8, 1958, six money judgments were entered against Bowman ranging in amounts from $43.81 to $835.85. The Deaton affidavit also indicated that the Credit Bureau of Calhoun County listed other claims against Bowman. The Deaton affidavit also supported the Hayes affidavit, in that it showed that Bowman had told one Mrs. Miriam Gregory on September 16, 1962, eight days after he made his allegations against appellant and intervenor on behalf of Reliable that he was going to work for a radio station in Calhoun, Georgia. (R. 104)

The Blue Ridge opposition also was accompanied by an affidavit of one W. E. McKenzie, a Calhoun, Georgia, businessman, which states that at one time Bowman tendered Mr. McKenzie a check drawn on the Calhoun National Bank which was returned to McKenzie showing that Bowman had no account with that bank. McKenzie stated that he would not believe Bowman on his oath. (R. 105-107)

The Blue Ridge opposition also was accompanied by an affidavit of Robert L. Payne, a businessman in Calhoun, Georgia, which shows that Mr. Payne once had to repossess a television set which he had sold to Bowman because Bowman had failed to keep up his payments on that set. Mr. Payne further states: "I wouldn't believe Richard Bowman on his oath as he will not live up to anything he says or does." (R. 108)

Other affidavits by Georgia businessmen which accompanied the Blue Ridge opposition reflected adversely upon Bowman's reputation for truth and reliability. (R. 109-110)

The Commission's Broadcast Bureau supported the Reliable request for the "strike application" issue against Blue Ridge, which was based solely upon the Bowman affidavit. (R. 88-91)

The Commission's Review Board granted the Reliable request and added the "strike application" issue against Blue Ridge in a Memorandum Opinion and Order released on January 21, 1963. The same order made appellant a party to the proceeding. The strike application issue upon which the entire case eventually turned reads as follows:

> "To determine whether the application of Blue Ridge Mountain Broadcasting Company, Inc., was filed in good faith or was filed solely or in part for the purpose of preventing or delaying the granting of a construction permit to Reliable Broadcasting Co., at Calhoun, Georgia." (R. 119-121)

Immediately after the Review Board added the strike issue on the basis of Bowman's affidavit, Blue Ridge requested the Commission to change the place of the hearing from Washington, D. C., to Calhoun, Georgia. Blue Ridge pointed out that the Hearing Examiner had ordered that evidence on the recently added "strike application" issue be presented in oral form and that rebuttal and surrebuttal evidence immediately follow the affirmative case. Blue Ridge pointed out further that witnesses who were expected to present evidence in this proceeding on its behalf lived in or near Calhoun, Georgia, and that if Blue Ridge were required to bring these witnesses to Washington, D. C., it would suffer great and needless expense. (R. 128-129) Both Gordon County and Reliable supported this request. (R. 130-133)

The Commission's Broadcast Bureau opposed the request to have the hearing held at Calhoun, Georgia. The Broadcast Bureau stated ". . . the testimony of only four persons . . ." was necessary under the "strike application" issue, and named those persons as Bowman, Joseph M. Acree, R. R. Magill, and Knox Carreker. (R. 134-137)

The Commission's Chief Hearing Examiner, in an Order released on March 1, 1963, denied the request that the hearing be held in Calhoun, Georgia. In so doing, he agreed with the position of the Commission's Broadcast Bureau contained in its opposition to having the hearing in Calhoun, Georgia, by stating:

> ". . . the petition does not contain a showing adequate to warrant a finding of 'good cause,' within the meaning of the Commission's Rules, to justify a field hearing under the new [strike application] issue aforementioned, for, *as contended by the Bureau, only a few persons are expected to give relevant testimony under this issue;* There is no indication as to the number of witnesses to be called by the petitioner; *and the new issue is narrow in scope and does not involve questions of particular concern to the local community . . .* [emphasis added]" (R. 138-139)

At the request of Blue Ridge the Reliable application was dismissed for failure to meet the statutory requirements concerning publication, by a Memorandum Opinion and Order of the Review Board released on March 4, 1963; one member dissenting and issuing a statement.[3]

Following a prehearing conference on January 31, 1963, hearing sessions were held in Washington, D. C., on May 15 through May 20, 1963, and on June 5 and 6, 1963, on the "strike application" issue.

On August 21, 1963, the Hearing Examiner issued his initial decision which found that the Blue Ridge application was not a "strike application." This correct decision found that the testimony of Messrs.

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[3] The order of the Review Board agreed with the Examiner's ruling refusing to accept evidence from Reliable on the grounds that he was without jurisdiction to do so, since Reliable had failed to comply with statutory provisions. The dissenting member of the Review Board criticized the Examiner for not continuing the hearing so as to allow Reliable to comply with the statuory provisions. The dissenting Board Member, in this statement, pointed out that Blue Ridge had a "character issue" against it whereas, Reliable did not have such an issue. (R. 140-145)

J. T. Acree, Harbin King, R. R. Magill, and Knox Carreker,[4] established that no one other than Messrs. King, Acree, Carreker, and the consulting engineer participated in the preparation of the Blue Ridge application.

The Examiner rejected the conflicting testimony that Mr. Magill participated in the preparation of the Blue Ridge application, which was given by Richard M. Bowman, the Commission's chief witness at the hearing, and whose allegations originally caused the Review Board to add the "strike application" against Blue Ridge and to make appellant a party to the proceeding.

After having had the opportunity to hear and observe all of the witnesses to this proceeding, the Hearing Examiner rejected Bowman's testimony, *in toto*, after giving specific examples to support his conclusion that Bowman's testimony was "incredible," "unworthy of belief," "evasive," "false," and that Bowman "displayed malice," a "willingness . . . to swear to facts which he believes will aid the cause he has adopted with utter indifference to the truth or falsity of his oath . . .," a willingness to conform his 'recollection' to what he believed to be independent evidence in corroboration of his testimony," and had "repeated failures of recollection when his examination developed into areas he did not appear to have anticipated." Based upon these uncontested findings of fact as to Bowman's credibility, the Examiner concluded that "Justice would not be served by permitting the ultimate conclusion herein to rest, even in part, on the testimony of this witness." (R. 273-276)

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[4] Messrs. Acree, Magill, and Carreker, were three of the four witnesses whose testimony the Broadcast Bureau claimed was necessary to resolve the strike application. The fourth such witness, Richard M. Bowman, was called as a witness at the hearing by the Commission's Broadcast Bureau.

The Examiner found that appellant and intervenor were not guilty of the "strike application" charges originally leveled at them by Bowman. He recommended a grant of the Blue Ridge application. (R. 277-279)

The Commission's Broadcast Bureau filed its Exceptions to the Initial Decision and a Brief in Support of Exceptions on October 18, 1963, requesting the Review Board to reverse the Initial Decision and deny the Blue Ridge application. (R. 288-308) Blue Ridge and Gordon County filed Replies to these exceptions on October 31, 1963. (R. 309-316) Oral argument was held before a panel of the Review Board on February 24, 1964.

At oral argument appellant and intervenor were made aware for the first time at any stage in this proceeding that the fact that they had not called additional witnesses in this proceeding would be used against them.[5] A member of the Review Board, referring to extensive testimony regarding the efforts made by various civic leaders of Ellijay, Georgia, to induce the principals of Blue Ridge or Gordon County to come forward and establish a radio station in that community, directed the following question to Counsel for the Broadcast Bureau:

> "Is it significant to you that none of those citizens were called to testify in this proceeding?"

And Counsel for the Commission replied: "Yes, sir . . ." (Tr. 968)

This was a complete reversal of Commission Counsel's prior contention that only four witnesses, all of whom had testified, were required for the resolution of the "strike application" issue, and upon which prior contention the Chief Hearing Examiner relied in refusing to permit the Hearing to be held in Calhoun, Georgia. (R. 138-139)

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[5] Appellant and intervenor called six witnesses to testify at the hearing. These witnesses included three of the four persons whose testimony the Broadcast Bureau claimed were necessary for resolution of the strike application issue. The fourth such person was called as a witness by the Broadcast Bureau.

On May 7, 1964, the Review Board released a Decision and Order which reversed the Hearing Examiner's Initial Decision, concluded that Gordon County participated in the planning, preparation and filing of the Blue Ridge application, further concluded that the Blue Ridge application was not filed in good faith and that it was filed solely or in part for the purpose of preventing or delaying the granting of a construction permit to Reliable Broadcasting Co., at Calhoun, Georgia, and ordered a denial of the Blue Ridge application. In reaching its conclusions it relied principally upon the testimony of Richard Bowman, which the Hearing Examiner, after having observed the demeanor of this witness, had rejected in its entirety. The Review Board in reversing the Hearing Examiner also employed several adverse presumptions against Blue Ridge and appellant, one of which was the failure to call Mrs. Magill as a witness. (R. 328-343)

On June 4, 1964, Intervenor and Appellant filed a Joint Application to Commission For Review pointing out many factual and legal errors in the Review Board's decision, including the improper reliance of the Board upon the unreliable and rejected testimony of Bowman and its improper employment of adverse presumptions against intervenor and appellant. (R. 360-380) Appellant and Intervenor requested the Commission to grant the Application For Review, reverse the Review Board and affirm the Hearing Examiner's Initial Decision, or in the alternative permit the parties to file briefs and present oral argument on this matter.

Over the objections of its Broadcast Bureau (R. 381-386), the Commission granted the application for review in a Memorandum Opinion and Order released on October 1, 1964 (R. 387-388). The Commission stated, *inter alia*, that the reasons advanced by the Board appear to be inadequate upon which to base the use of presumptions, and directed the Board to clarify and reevaluate its decision in these respects.

Less than two weeks later, on October 13, 1964, the Review Board issued another decision in this proceeding. Aside from the deletion of several paragraphs containing two of the presumptions earlier employed

by it against appellant and intervenor in its first decision, and the addition of an introductory paragraph, the second Review Board decision, was in all essential respects identical with its first decision. Its conclusions concerning a "strike application" were again adverse to appellant and intervenor and it again denied the Blue Ridge application. (R. 389-401)

Appellant and Intervenor filed a Joint Application to Commission for Review of this second Review Board decision on November 27, 1964. (R. 408-425) This was opposed by the Commission's Broadcast Bureau on December 14, 1964 (R. 426-436) and denied by the Commission on January 7, 1965 (R. 439). This appeal followed.

STATUTES INVOLVED

The statutes involved are the Administrative Procedure Act and the Communications Act of 1934, as amended. The pertinent portions of these Acts are printed in the Appendix to this Brief.

STATEMENT OF POINTS

1. The Commission's Review Board violated basic principles of law by reversing the Hearing Examiner's findings as to the credibility of a witness without giving cogent reasons for its reversal and by basing its decision, in principle part, upon the testimony of a witness which the Examiner had previously rejected as unreliable and false.

2. Since the Review Board's decision cannot be supported without its reliance upon unreliable and false testimony, its decision is not supported by the substantial evidence of record when considered as a whole and is therefore in violation of Section 7(c) of the Administrative Procedure Act.

3. The Review Board's Decision incorrectly found that appellant had conspired with intervenor in filing a bad faith application and had made misrepresentations to the Commission, and appellant has suffered

and will continue to suffer injury as a result thereof, and therefore appellant is a person aggrieved or whose interests are adversely affected within the meaning of Section 402(b)(6) of the Communications Act of 1934, as amended.

SUMMARY OF ARGUMENT

The question of credibility of a witness is one for determination by the trier of fact who has the superior advantage of observing the demeanor of the witnesses. In administrative proceedings, the agency should not reverse its hearing examiner on determination of a witness' credibility where credibility is the principal issue to be decided without giving compelling and cogent reasons for its action. *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *National Labor Relations Board v. Dinion Coil Co.*, 201 F.2d 484 (1952); *National Labor Relations Board v. James Thompson & Co., Inc.*, 208 F.2d 743 (1953); *National Labor Relations Board v. Local 160, International Hod Carriers, Building & Common Laborers Union of America, AFL-CIO*, 268 F.2d 185 (1959); *United States Steel Co. (Joliet Coke Works) v. National Labor Relations Board*, 196 F.2d 459 (1952).

The principal issue to be decided here is one of credibility. The Review Board added an issue in this proceeding to determine whether intervenor's application was filed in good faith, or whether it was a block application to prevent or delay a grant of the application of Reliable Broadcasting Co. The addition of this issue by the Board was based upon the allegations made by one Richard Bowman, a former employee of appellant, who claimed that appellant's President participated in the preparation and filing of intervenor's application. Bowman further charged the appellant's President and intervenor's President told him that intervenor's application was being filed to block the Reliable application. As a result of these allegations, the Review Board named appellant a party respondent to the proceeding.

After hearing and observing the witnesses at the proceeding, the Hearing Examiner found that appellant's President did not participate in the preparation and planning of intervenor's application. The Examiner further found that intervenor's application was filed in good faith and not for the purpose of preventing or delaying a grant of the Reliable application. The Examiner recommended a grant of intervenor's application.

The Hearing Examiner rejected entirely the testimony of the Commission's principal witness, Bowman, who testified at the hearing that Appellant's President assisted in the preparation of intervenor's application. After citing several specific examples, the Examiner concluded that Bowman's testimony was "false," "incredible," "evasive," and "unworthy of belief."

Upon appeal by the Commission's Broadcast Bureau, the Review Board, without stating cogent or compelling reasons, reversed the Examiner's credibility finding as to the Commission's principal witness and made findings on Bowman's unreliable testimony. Based principally on these findings, it reversed the Hearing Examiner's ultimate conclusion and found that appellant and intervenor had participated in the preparation and filing of intervenor's application, that appellant and intervenor had made misrepresentations to the Commission, and that intervenor's application was filed in bad faith for the purpose of preventing or delaying a grant of the Reliable Broadcasting Co. application. The Review Board denied intervenor's application.

The Review Board erred in reversing the Hearing Examiner's credibility findings and in basing its decision on "false," "incredible," and "evasive," testimony. Since the Review Board's decision cannot be supported by substantial reliable and probative evidence of record when considered as a whole, it is contrary to Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Sec. 1001 *et seq.*

As a result of the Review Board's erroneous decision which found appellant guilty of bad faith dealings and misrepresentations before the Commission, appellant has, and will continue to suffer injury. Therefore, appellant is a person aggrieved or whose interests are adversely affected by the Board's decision, within the meaning of Section 402(b)(6) of the Communications Act of 1934, as amended, with standing to bring this appeal.

ARGUMENT

I

BASIC LAW

It is a basic and well established principle of law that the credibility of a witness is a question for determination by the trier of fact in a particular case. In civil and criminal jury trials the question of credibility is peculiarly within the ambit of the function of the jury. Of course, this function redounds to the trial judge in nonjury cases. In any event, the question of credibility is generally not one for determination by the reviewing or appellate tribunal.

This basic concept withstands the test of practicality since it is the trier of fact who can observe the demeanor of the witness and is therefore uniquely qualified to weigh his credibility. This common sense principle applies also to proceedings before administrative bodies where the trier of fact is generally, as in this case, the Hearing Examiner.

Any discussion concerning the weight which must be given by an administrative body to findings by its hearing examiner on the issue of credibility must begin with a statement of the general guidelines on this subject which were laid down by the Supreme Court of the United States in *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed 456 (1951). There the

Court, speaking through Justice Frankfurter, stated, at page 490, the following:

> "[There are] ... indications in the legislative history [of the Administrative Procedure Act] that enhancement of the status and function of the trial examiner was one of the important purposes for administrative reform."
>
> "This aim was set forth by the Attorney General's Committee on Administrative Procedure:
>
> 'In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.'
>
> "Apparently it was the Committee's opinion that these recommendations should not be obligatory ... "

However, the Court went on to say, at page 495, *et seq.*, the following:

> "But this refusal to make mandatory the recommendations of the Attorney General's Committee should not be construed as a repudiation of them. Nothing in the statutes suggests that the Labor Board should not be influenced by the examiner's opportunity to observe the witnesses he hears and sees and the Board does not. Nothing suggests that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands. To the contrary, all of the Administrative Procedure Act contains detailed provisions designed to maintain high standards of independence and competence in examiners ... High standards of public administration counsel that we attribute to the .... examiners both due regard for

the responsibility which Congress imposes on them and the competence to discharge it."

"The committee reports also make it clear that the sponsors of the legislation thought the statutes gave significance to the findings of examiners. Thus, the Senate Committee, responsible for the Administrative Procedure Act, explained in the report that *the examiners' decisions 'would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing.'* The House Report reflects the same attitude; and the Senate Committee Report on the Taft-Hartley Act likewise indicates regard for the responsibility devolving on the examiner [emphasis added]."

> "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that *evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witness and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.* The findings of the examiner are to be considered along with the consistency and probability of testimony. *The significance of his report, of course, depends largely on the importance of credibility in the particular case.* [emphasis added]"

These basic principles were further expounded by various United States Courts of Appeals in applying them to specific cases where an administrative agency had reversed its hearing examiner on a finding of credibility. Invariably, these courts, in reversing the agency's rejection of the examiner's findings on the question of credibility, have

pointed out in clear language the great weight which must be attached to the findings of the trier of fact who has had the advantage of observing the witness, and is thus uniquely qualified to pass upon his credibility. An excellent discussion of the history and reasons for this principle of law is contained in Judge Frank's opinion in *National Labor Relations Board v. Dinion Coil Co.*, 201 F2d 484, 487 (1952).

In *National Labor Relations Board v. James Thompson & Co., Inc.*, 208 F. 2d 743 (1953), Judge Learned Hand, stated the following, at page 745:

> "This issue seems to us to be one on which the examiner's finding should have prevailed under the doctrine of Universal Camera Corp. v. National Labor Relations Board — [supra]. 'Good faith' is one form of credibility; it means that the motive that actuated the conduct in question was in fact what the actor ascribes to it: i.e. that what he gives as his motive was in truth his motive. ... As was inevitable, the Supreme Court did not try to lay down in general terms how far the Board should accept the findings of its examiner. Plainly, it did not mean them to have the finality of the findings of a master in chancery, or of a judge; but it necessarily left at large how much less reluctance the Board need feel in disregarding them than an appellate court must feel in doing the same to the findings of a district judge. The difficulty is inherent in any review of the findings of a judicial officer who chooses between discordant versions of witnesses whom he has seen, because the review does not bring up that part of the evidence that may have determined his choice. Over and over again we have refused to upset findings of an examiner that the Board has affirmed, not because we felt satisfied that we should have come out the same way, had we seen the witnesses; but because we felt bound to allow for the possible cogency of the evidence that words do not preserve. We do not see any rational escape from

> accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that a few findings will not survive such a test."
>
> "So tested, it seems to us that the examiner's finding should stand ... At least ... [the Board's reason] was quite insufficient to overturn those indications of good faith [credibility] that the examiner may have found in ... [the witness's] behavior on the stand. We reinstate the reversed [hearing examiner's finding.]"

Similar strong statements were made by the United States Court of Appeals for the 7th Circuit in *United States Steel Co. (Joliet Coke Works) v. National Labor Relations Board,* 196 F.2d 459 (1952). That Court also refused to permit the administrative body to reverse its hearing examiner on a question of a witness' credibility. There, the Court, after quoting extensively from *Universal Camera, supra,* said, at page 467, the following:

> "We realize that the Board, upon reading the cold record, did not agree with the trial examiner's findings to the effect that the plant protection employees must have known or been informed who the 25 Gary supervisors were, but it was the examiner who had the opportunity to hear and see the witnesses. In a similar situation in the case of *Ohio Associated Tel. Co. v. National Labor Relations Board,* 6 Cir., 192 F. 2d 664, 668, the Court said: 'In view of the fact that the examiner heard and saw the witnesses, and the Board did not, it is pertinent to inquire into the relative weight to be given, by a reviewing Court to the findings of examiner and Board *** It would seem therefore, that in giving consideration to the whole record, as now we are obliged to do, *we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility,* far ascertaining the truth. [emphasis added]"

In *National Labor Relations Board v. Local 160, International Hod Carriers, Building & Common Laborers Union of America, AFL-CIO,* 268 F. 2d 185 (1959), the Court said, at page 187, the following:

> 'We perhaps have pursued this evidentiary point further than necessary because there is a more compelling reason why we think the finding under attack should not be accepted. A resolution of the issue by the Trial Examiner depended upon his appraisement of the credibility of the witnesses. He saw and heard them testify, including their explanations as to any inconsistent statements contained in the affidavits ... There being nothing involved other than the issue of credibility, we think the Board went too far in its refusal to accept the Trial Examiner's resolution of the issue as to when the agreement was executed."

It appears that with the advent of the above decisions which clearly set forth that an examiner's findings in the area of credibility must be given great weight by the administrative body, most federal administrative agencies have generally heeded this principle laid down by the Courts. In 1959 the Federal Trade Commission held that a hearing examiner confronting the witnesses is pecularily qualified to determine their credibility and the weight to be given to their testimony. *Basic Books, Inc.*, 9 Pike & Fischer Ad. L. (2d) 557. Similarly, the National Labor Relations Board has held that it will not overrule an examiner's resolutions as to credibility except where the clear perponderence of all the relevant evidence shows that the examiner's resolution was incorrect. *American Life and Accident Insurance Co. of Kentucky*, 9 Pike & Fischer Ad. L. (2d) 1044 (1960).

In this case the Commission's Review Board simply ignored the clear and impressive bulwark of case precedents established by the United States Courts of Appeals cases discussed above. The Review Board, without cogent reasons, and having never seen a single witness at the hearing, relied upon the testimony of the principal Commission

witness in this proceeding which the Hearing Examiner, who had observed this witness, characterized as unreliable. The principal issue in this case deals with whether the Blue Ridge application was filed in "good faith," and the issue is therefore one of credibility. Under these circumstances, especially in light of the fact that there is conflicting testimony, the reversal by the Review Board of the Examiner's credibility findings without stating compelling reasons for its reversal was an arbitrary, capricious action, and reversible error.

II

CREDIBILITY THE BASIC ISSUE

Appellant, Gordon County Broadcasting Company, is the licensee of Station WCGA, Calhoun, Georgia. The principal owners of this corporation are Judy D. Magill (58%), and her husband, Robert R. Magill (2%), who is also appellant's president.

Intervenor here, Blue Ridge Mountain Broadcasting Company, Inc., was an applicant for a new standard broadcast station at Ellijay, Georgia, in the proceeding before the Commission. That corporation is owned by Joseph M. Acree (36.4%), his father, J. T. Acree (36.4%), and Harbin M. King (27.2%). Joseph M. Acree is now the son-in-law of the Magills, although they were not so related at the time the Blue Ridge application was prepared and filed at the Commission. Mr. King is the Magills' attorney and a personal friend of theirs.

The principal issue to be decided in this proceeding was:

> "To determine whether the application of Blue Ridge Mountain Broadcasting Company, Inc., was filed in good faith or was filed solely or in part for the purpose of preventing or delaying the granting of a construction permit to Reliable Broadcasting Co., at Calhoun, Georgia."

This issue was added to this proceeding by the Review Board as a direct result of allegations made by one Richard M. Bowman, which were contained in his affidavit submitted to the Commission on September 18, 1962, on behalf of Reliable Broadcasting Company, then a competing applicant in this proceeding. (R. 78-84) Bowman claimed that he assisted in typing the Blue Ridge application under the direction of Mr. Magill, and that Mr. Magill and Joseph Acree told him that they were filing the Blue Ridge application to block the Reliable application. Before the strike issue was added, substantial information was submitted under oath to the Review Board by several businessmen from the Calhoun, Georgia, area which reflected adversely upon Bowman's reputation for truth and veracity, and reliability. (R. 92-110) Despite these affidavits which strongly attacked the allegor Bowman's reputation, the Commission's Broadcast Bureau supported Reliable's request for the strike application issue against Blue Ridge, (R. 88-91) which also implicated appellant, and the Review Board granted the request, added the strike application issue, and made appellant a party respondent to this proceeding. (R. 119-121)

In his affidavit which precipitated the addition of the "strike application" issue, Bowman made the following sworn statement to the Commission:

> "That I make this statement due to my desire that the radio listeners of my community may be supplied with a modern up-to-date broadcasting facility such as will be supplied by the Reliable Broadcasting Company due to the applicants being persons with adequate capital, business ability and engaged in many civic activities and progressive movements." (R. 282-283)

At the hearing, Bowman testified repeatedly that he dictated the text of the affidavit without assistance of anyone, and that the contents and phraseology of the document were his own. However. Bowman finally admitted under cross examination that he knew nothing of the financial

resources or the civic activities of the Reliable partners. (R. 275) Thus, it is clear that from the very outset of the "strike application" issue, the Review Board relied upon statements by Bowman which were unreliable and tainted with falsehood, to say the least.

The Hearing Examiner in finding that Bowman was an unreliable and discredited witness stated that the above sworn statements by Bowman concerning things of which he had no knowledge showed " ... a willingness on Bowman's part to swear to facts which he believes will aid the cause he has adopted with utter indifference to the truth or falsity of his oath. This ... is not the mark of a reliable witness." (R. 275)

Before the Review Board relied upon Bowman's *unreliable* affidavit in adding the strike application issue which implicated appellant in this proceeding, appellant's President, Robert R. Magill, submitted an affidavit to the Review Board, which reflected adversely on Bowman's motives and tended to show his extreme bias. Mr. Magill informed the Review Board that Bowman had been employed by appellant at Station WCGA, Calhoun, Georgia, on three occasions. The first period of that employment was from some time in 1954, until April 14, 1956, at which time he was dismissed by appellant because his wages were being garnished by his creditors. The second period of Bowman's employment by appellant was from January 31, 1954, through June 24, 1961. The third time Bowman worked for appellant was from about July 1, 1961, through the week ending October 20, 1961, at about which time appellant's President " ... swore out a criminal warrant charging said Richard M. Bowman with the offense of larceny after trust." Mr. Magill further stated to the Review Board that this criminal warrant was not prosecuted because Bowman agreed to repay the missing money, and that as of September 14, 1962, the date of the Magill affidavit to the Review Board, a part of the money had been repaid by Bowman, but that a balance remained unpaid and past due. (R. 97-98)

Bowman testified at some length at the hearing concerning the charge of larceny after trust which had been made against him by Mr. Magill. Since the Examiner's correct findings from the evidence of record on this matter pertaining to the credibility of Bowman as a witness are most important and are uncontroverted they are set out in full. (R. 274)

> "21. On August 12, 1961, Magill swore out a warrant charging Bowman with larceny after trust. The warrant was not prosecuted, and the parties have stipulated that no question of Bowman's guilt or innocence of the alleged larceny was established on this record or shall be considered in determining his veracity, except insofar as the swearing out of the warrant tends to establish bias on the part of the witness.[6] Within the ambit of that stipulation Bowman gave certain testimony that is of use in evaluating his candor as a witness.
>
> "22. Bowman's employment at WCGA terminated in October, 1961, some two months after the warrant was issued. For a period of time prior to the severance of the employment relationship, a certain sum was regularly withheld from his wage in repayment of the monies he had allegedly taken. He testified at length and in considerable detail to establish that he had not taken the money and in explanation of who the actual thief was and how the deed was perpetrated. However, he claimed that he did not recall how much was withheld from his pay while he made restitution. *This is simply incredible*. Assuming Bowman to be innocent as he claimed, and noting his detailed testimony as to what he contended actually happened to the missing money, he would necessarily have deemed it a great injustice that he was required to make restitution,[7] and *it is not credible* that he would forget the sum by which his pay was docked each pay day. While no motive for his evasion on this point readily suggests itself, and the matter is not relevant to the

designated issue, *his repeated contention* that he could not recall the weekly payment *is deemed to be evasive, and is an example of repeated failures of recollection when his examination developed into areas he did not appear to have anticipated.*

"[6] In any event, it would be exceedingly difficult to say whether the swearing out of the warrant would bias Bowman more against Magill if he were guilty or if he were innocent.

"[7] In fact, Bowman was asked the question, 'And after many years of loyal service you felt that this was a pretty low-down trick did you not?' He replied in the negative, and *this answer, too, is deemed unworthy of belief.* While there well may be individuals who have achieved the philosophical stature necessary to forgive such a wrong, *this witnesses* [sic] *demeanor* displayed unusual sensitivity and response to real or imagined abuses or implied doubts as to his veracity. [emphasis added throughout]"

There is testimony by both Bowman and Joseph M. Acree, Blue Ridge's President, that Bowman typed a program schedule for the preparation of the Blue Ridge application. However, three witnesses, *viz.*, Joseph M. Acree, Harbin M. King, the Secretary-Treasurer and 27.2% stockholder of Blue Ridge and a lawyer by profession, and Mr. Magill, directly refuted Bowman's testimony concerning the circumstances under which he (Bowman) did the typing. The Examiner correctly found that Bowman's testimony in this regard was "false" and "displayed malice." Since the Examiner's findings on this point are also most crucial to his credibility findings on Bowman they are set forth below: (R. 275)

"23. Of more direct pertinence was Mr. Bowman's testimony as to the typing of the programming exhibit which was submitted to the Commission with the application. Bowman was shown the exhibit, and affirmed that he typed it. He recalled that he typed it two columns to each page, and stated that he did so on Magill's specific instructions.[8] Subsequently, he recanted his identification

> of the exhibit as the one he had typed, and identified another exhibit as his work product. The later identified exhibit had a one column composition. *Thus, his positive statement* that the exhibit he typed consisted of two columns and was so constituted at Magill's specific instructions, *was false*. Insofar as he testified that he typed two columns after being shown what he then believed to be the exhibit he had typed, *he displayed a willingness to conform his 'recollection' to what he believed to be independent evidence in corroboration of his testimony*. Insofar as he attributed the matter to Magill, *his inventiveness displayed malice*. Neither quality is calculated to engender confidence in his testimony. [emphasis added]"

After making these specific, uncontroverted findings that Bowman's testimony was "false," "incredible," "evasive," and "unworthy of belief," and that Bowman displayed "malice," "repeated failures of recollection," "a willingness to conform his recollection to what he believed to be independent evidence in corroboration of his testimony," "a willingness to swear to facts which he believes will aid the cause he has adopted," and "utter indifference to the truth or falsity of his oath," the Examiner rejected in its entirety Bowman's testimony by stating:

> "The foregoing examples do not exhaust the inconsistencies or inaccuracies in Bowman's testimony, but they are deemed illustrative thereof, and, by themselves, are considered sufficient to require the rejection of Bowman's testimony. While there may be truth in Bowman's story, there is certainly falsity, and an attempt to separate the two would be an exercise in conjecture. Justice would not be served by permitting the ultimate conclusion herein to rest, even in part, on the testimony of this witness." (R. 276)

Appellant agreed with the Examiner's finding that the examples which he gave did not exhaust the inaccuracies or inconsistencies in

Bowman's testimony. However, they were surely sufficient to support the Examiner's rejection of that witness's testimony *in toto*. Therefore, neither appellant nor the intervenor, Blue Ridge, filed exceptions to the initial decision requesting that additional findings be made from the evidence which would further substantiate and support the Examiner's action in rejecting Bowman's testimony.

Most significantly, the Broadcast Bureau, which was the only party to this proceeding to file exceptions to the Examiner's decision, did not question in any way the Examiner's findings and conclusions that the Commission's principal witness in this proceeding gave false, unreliable and completely unbelievable testimony, and that *justice* would not be served by permitting the ultimate conclusion in this case to rest, even in part, on the testimony of this witness. (R. 288-308)

III

THE REVIEW BOARD'S REVERSAL OF THE EXAMINER'S CREDIBILITY FINDINGS

On appeal by the Broadcast Bureau, in the face of the specific and detailed findings of fact and conclusions of the Examiner which completely and correctly discredited Bowman's testimony, and which remained unchallenged by any party to this proceeding, the Commission's Review Board, without first controverting in any manner the fact that Bowman's testimony was "false," "incredible," "evasive," or "unworthy of belief," began to build its case against the intervenor and appellant by making so-called findings of "fact" based upon this completely discredited testimony. (R. 391-390) Thus, the Review Board attempted to vindicate its original action of relying upon Bowman's affidavit to it, later proved to be erroneous, in adding the strike application issue, by relying on this testimony for the second time, after at least three witnesses had testified that it was false, and two other witnesses gave testimony showing Bowman's malice and extreme bias, and after that testimony had been completely rejected as "incredible" by the Hearing Examiner who saw and heard the witness.

It appears that the Commission's Review Board, both in its Grand Jury function in adding this strike application issue based upon Bowman's affidavit which was tainted with bias and untruth, and in its appellate function in making findings on the testimony of Commission witness Bowman, was bound and determined to accept Bowman's statements as true despite the mountain of evidence that it was "false" and "incredible". The instant case points up dramatically the inherent dangers in the administrative law system where, as here, the same body acts as "police department," "Grand Jury", "prosecutor," and eventually "judge" and "jury." This reversal of the Hearing Examiner's credibility findings concerning Bowman, without rhyme or reason by the Review Board was, it is respectfully submitted, reversible error.

After the Review Board made extensive findings on Bowman's previously discredited testimony, it concluded, without discussing the validity of that testimony, and without considering the testimony of several other witnesses at the proceeding which contradicted Bowman's testimony, that Blue Ridge and appellant had engaged in the filing of a "strike application." (R. 394) Only then did the Review Board deign to treat the Examiner's rejection of Bowman's testimony.

The Board implied that the Examiner employed the maxim *falsus in uno, falsus in omnibus;* that the maxim is permissive and not mandatory; and that "on the facts before us" the rejection of Bowman's entire testimony was not required. (R. 395) The Board's "reasons" are completely contrary to the facts and in any event contrary to law.

First of all, the Examiner nowhere states or implies in his initial decision that he applied the maxim *falsus in uno, falsus in omnibus,* which the Review Board attributes to him. Secondly, the Examiner did not, in fact, reject Bowman's testimony because it was false merely on *one* material aspect of the case. On the contrary, even a cursory reading of the Examiner's decision points out many, many areas where

Bowman's testimony was "false," "incredible" and "evasive." Therefore, it was not necessary to apply the maxim *"falsus in uno ...* " and it was not applied.

In any event, even if the maxim had been applied, the fact that it is permissive in nature is not sufficient reason for the reviewing authority to arbitrarily hold that it should not have been applied. The permissive nature of the doctrine leaves the choice as to when it is to be applied to the trier of fact, who has the superior advantage of observing the witness. It does not give that choice to the reviewing authority, which must rely upon the cold record. Compelling reasons must be given by an administrative body for reversing findings of credibility made by its hearing examiner, where, as here, credibility is the principal issue to be decided. The above cited and discussed cases, clearly so hold. The Review Board gave no compelling reasons for its reversal of the Examiner's credibility findings in this case.

Apparently, the Review Board does not agree with the clear case precedent on this point, and merely states in a footnote that it is "not bound" by the Examiner's credibility and demeanor findings. In alleged support of its erroneous statement of the law it cites *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 75 S. Ct. 855, 99 L. Ed 1147, (1955); *National Labor Relations Board v. Pacific Intermountain Co.*, 228 F. 2d 170, and *In re Howard W. Davis, (The Walmac Co.)*, 36 FCC 507, 2 Pike & Fischer RR 2d 145 (1964). (R. 395) Neither *Allentown,* nor *Pacific Intermountain, supra,* dealt with situations where credibility was the principal issue to be decided. Obviously, those cases are inapposite here where credibility is the principal issue to be decided. On that basis, those cases in no way contradict or affect the application to this proceeding of the clear principles enunciated in the *Universal Camera, James T. Thompson,* and *United States Steel Co.*, cases, cited and discussed in detail, *supra.*

The *Howard W. Davis, (Walmac Co.)* case, *supra*, not only does not support the Board's erroneous concept of law, it is in keeping with the court precedents on the point that an administrative body should not reverse a hearing examiner on credibility findings where that is the principle issue to be determined. There the Commission stated that *Davis'* candor and reliability as a licensee was the "crucial" issue to be decided. The Hearing Examiner found in favor of Davis on this issue. Although the Commission stated that it did not "fully concur" with all of the findings and conclusions of the Examiner in this regard, and that it had "serious disagreement" with the Examiner's ultimate approach to that case, it affirmed the Examiner in his conclusions in favor of Davis' credibility.

IV

THE REVIEW BOARD'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL, RELIABLE AND PROBATIVE EVIDENCE OF RECORD WHEN CONSIDERED AS A WHOLE

It is clear that if the Review Board had rejected Bowman's testimony as the Examiner did and as it should have done, its adverse conclusions as to appellant and intervenor that they participated in filing a "strike application" could not stand. The Review Board stated that its adverse conclusion against appellant and intervenor that they participated in filing a strike application is based upon " ... the timing of the filing of the Blue Ridge application, the relationship of the Blue Ridge principals to the Magills, on Bowman's testimony concerning Mr. Magill's preparation of the proposed program schedule, on Shuman's testimony, and on the failure of Mrs. Magill to testify in the proceedings." (R. 394) Later, the Review Board admits that its decision rests in the main on Bowman's testimony when it states that "We agree that family relationship, business privity or friendship, standing alone, does not prove that a block application has been filed, or that the conversations which Shuman overheard may not be entirely

sufficient, in themselves, to establish a concert of action between Magill and King." (R. 400) Since the "presumption" invoked against appellant for not calling Mrs. Magill as a witness relates only to the Shuman testimony which the Review Board admits is not sufficient alone to support its conclusion against appellant, that leaves only the Bowman testimony, as the principal basis for the Review Board's decision. Reliance on this testimony after it had been rejected *inter alia*, as "incredible" and "false" by the Examiner who saw and heard the witnesses, was clear error by the Board. The Review Board's Decision is not supported by substantial evidence of record when considered as a whole. Administrative Procedure Act, Section 7(c), 5 USC §1006(c); *Universal Camera, supra.*

Mr. Lyle W. Shuman, a former employee at Station WCGA, was called as a witness at the hearing by the Commission.[6] Mr. Shuman was employed at appellant's Station WCGA from June to December, 1961. It was his testimony that during this period appellant received a publication of the Georgia Association of Broadcasters which contained a list of applications then pending before the FCC and giving their processing number. The Reliable application was shown to be high on this list while the intervenor's application was much further down. Shuman testified, that on observing this, Mrs. Magill, in Shuman's presence, told her husband to call Mr. King and have him check with Washington counsel to make sure that everything necessary had been done to insure the hearing consolidation of the two applications. Mr. Magill telephoned Mr. King in Shuman's presence and conveyed the message requested by Mrs. Magill. The Hearing Examiner made, in substance, the above findings, (R. 272) and then made the following findings on Shuman's testimony:

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[6] Despite the fact that the Commission's counsel had earlier represented to the Review Board that only Messrs. Bowman, Acree, King, and Magill would be necessary witnesses on the "strike application" issue.

> " ... However, it is to be pointed out that the fact that the finding that Magill was actually in communication with King relative to the Blue Ridge application is not tantamount to a finding that Magill participated in or assisted in, the preparation or filing of the application." (R. 273)

The Review Board modified the Examiner's findings to add that Shuman testified that Mrs. Magill referred in her conversation to "our application." The Commission's Review Board then invoked a "presumption" against appellant for the "failure" to call Mrs. Magill as a "material witness," (R. 393) despite the fact that the Review Board admits that Shuman's testimony alone, would not support a finding that Messrs. Magill and King acted in concert in the filing of the Blue Ridge application. (R. 400) More importantly, this "presumption" was unjustly used against appellant and intervenor by the Commission's Review Board because *from the very beginning of this case the Commission's own counsel maintained that Mrs. Magill's testimony was not necessary for resolution of the strike application issue.*

On February 15, 1963, before the hearing in this proceeding began, Intervenor, Blue Ridge, requested that the hearing be moved from Washington, D.C., to Calhoun, Georgia. This request pointed out that the Hearing Examiner had directed that evidence on the then recently added "strike application" issue be presented in oral form and that rebuttal and surrebuttal evidence was to immediately follow the direct affirmative case. Blue Ridge further pointed out that this procedure would require it to have its witnesses for direct and surrebuttal evidence present or readily available at all stages of the hearing, and that since its expected witnesses live in or near Calhoun, Georgia, Blue Ridge would suffer a great and needless expense, if the hearing were held in Washington, D. C. (R. 128-129) Both appellant and Reliable Broadcasting Co. supported this request. (R. 130-133)

The Commission's Broadcast Bureau opposed the request for change of location of the hearing stating that the " ... addition of this [strike application] issue requires that the testimony of only four persons is necessary to adduce evidence under this issue." The Commission specifically named these four persons as Richard M. Bowman, Joseph M. Acree, R. R. Magill, and Knox Carreker. (R. 135) The Chief Hearing Examiner, in reliance upon the Broadcast Bureau's statement in this regard, thereupon denied the request that the hearing be moved to Calhoun, Georgia. (R. 138-139)

Thus, the Commission's own counsel indicated early in this proceeding that Mrs. Magill's, and for that matter, Mr. Shuman's, testimony was not required. For the first time at any stage in this proceeding, the Commission's counsel reversed his former position and stated at oral argument before the Review Board that he believed it was significant that additional witnesses were not called by intervenor or appellant. (Tr. 968) These facts point up dramatically the lengths to which the Commission and its counsel had to go in attacking the Hearing Examiner's initial decision and in reaching a conclusion adverse to appellant and intervenor. Under these circumstances, especially in view of the statements made by the Commission's own counsel, it was certainly not in the interests of fair play or justice for the Review Board to invoke an adverse presumption against appellant and intervenor for failing to call Mrs. Magill as a witness. This is especially true when the Board admits that the testimony which she should have rebutted was not decisive of the case.

In any event, even taking Shuman's testimony in its unrebutted position it, at most, shows that appellant's principals were in communication with intervenor's principals, months after the application was prepared and filed. It does not contradict the sworn testimony of three witnesses that Gordon County's principals in no way parti-

cipated or assisted in the preparation and filing of the Blue Ridge application. The Hearing Examiner correctly so found.[7]

It is clear therefore, that not a single basis upon which the Review Board relied in reversing the Examiner and in reaching its adverse decision against intervenor and appellant will stand up under the tests of applicable law, the facts of this record, or simple considerations of justice and fair play.

In attempting to justify its reliance upon Bowman's completely discredited testimony the Review Board relies solely upon *rebuttal* evidence and a presumption adverse to appellant and intervenor, without *first* considering the evidence produced by appellant and intervenor in the presentation of their direct cases. By starting in the middle, the Review Board claims that a "prima facie" case is established that intervenor and appellant did, in fact, participate in the filing of a "strike application." (R. 389-394)

The Review Board later states that appellant had the burden of proof under the "strike application" issue and that it was incumbent upon it to affirmatively establish that its application was filed in good faith and not for the purpose of preventing or delaying the granting of a construction permit to Reliable Broadcasting Co., at Calhoun, Georgia. (R. 399) Appellant has no argument with the statement that the applicant Blue Ridge had the burden of proof under this issue.

However, given the burden of proof, intervenor and appellant also had the initial burden of proceeding and the establishment of a *prima*

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[7] The Review Board claims that Shuman's testimony "corroborated" Bowman's testimony. (R. 395) This is not correct. First of all, Bowman's testimony must stand or fall of its own weight. The Examiner properly rejected this testimony and the Review Board gave no valid reasons for reversing that decision. In any event, Bowman's testimony related to events which allegedly took place in the preparation of the Blue Ridge application. Shuman's testimony was in reference to events which allegedly took place long after the Blue Ridge application was filed, and in no way "corroborates" or relates to Bowman's false testimony that Mr. Magill participated in the *preparation* of the Blue Ridge application.

facie case. Both intervenor and appellant fulfilled this burden of proceeding by initially presenting six witnesses who testified. Orderly procedure would demand therefore that a proper consideration of whether a *prima facie* case had been established must begin with consideration of the evidence presented by appellant and intervenor in their direct cases, since it is they who had the burden of establishing *prima facie* that they did not participate in the filing of a strike application issue. The Hearing Examiner properly followed the procedure of considering the direct evidence of appellant and intervenor *first,* before weighing the rebuttal evidence.

The Review Board, however, would like to have it both ways. On one hand it states that the burden of proving a *prima facie* case that the Blue Ridge application was *not* a strike application was upon intervenor. (R. 399) On the other hand it concludes that a *prima facie* case that the Blue Ridge application *was* a strike application is established by considering *only* rebuttal evidence and in dealing in a presumption adverse to appellant and intervenor. (R. 389-394)

This is will-o'-the wisp reasoning by the Review Board to further build a house of cards against appellant and intervenor and vindicate itself for adding the strike application based upon Bowman's unreliable testimony in the first instance.

In the circumstances of this case the evidence of the direct case must be considered first, and then the rebuttal evidence considered and weighed in light of the direct evidence which it was intended to rebut before any proper conclusions can be reached as to whether a "prima facie" case had been established. The Hearing Examiner followed this proper procedure. In so doing, he stated:

> "No acceptable affirmative evidence on this record establishes that anyone other than King, Acree, Carreker, and the consulting engineer participated in the preparation of the Blue Ridge application." (R. 272)

Under the facts of this case, the Hearing Examiner's conclusion in this regard must be sustained.

Only after prematurely concluding on the basis of rebuttal testimony alone, chiefly that of the discredited witness Bowman, that the Blue Ridge application was a strike application filed in collusion with appellant, did the Review Board bother to treat the direct evidence in this proceeding which established that such was not the case. Of course, since it had already made up its mind that appellant and interviewer were "guilty as charged" by it, the Review Board then rejected out of hand the direct testimony of six witnesses who appeared on behalf of appellant and intervenor which contradicted the testimony of Bowman. The rejection by the Review Board of the direct evidence in this case is based, not upon other probative or valid evidence of record in this proceeding, but upon surmise and innuendo, and a confusion and distortion of the true facts of record.

The Examiner made the following correct findings concerning the circumstances surrounding the history of the filing of the application by King and Acree for a station in Ellijay: (R. 270)

> " ... In September or October of 1960, a group of merchants in Ellijay called Mr. Magill for the purpose of interesting him in establishing a station in their town. They endeavored to acquaint him with the advertising potential of the area, offered to purchase stock in the venture, and one of them offered to provide and remodel a studio building rent-free. Mr. Magill discussed the matter with Mr. King, and they decided to prepare and file an application for Ellijay. Their decision was based on their belief that new construction and new industries in the area indicated that Ellijay was growing and would provide a satisfactory market. They did not attempt to consult pertinent statistical indices, and were not aware that Ellijay had actually declined in population from 1,527 persons in 1950 to 1,320 persons in 1960. However, their decision was based

> in part on the knowledge that a WCGA auxiliary studio which had been located in Ellijay from 1953 to 1956 grossed $300 - $400 per week."
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> * * *
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> " ... After Magill received the engineer's report around November 22, 1960, indicating that the Ellijay application on 1500 kc would be mutually exclusive with the Reliable application at Calhoun, he abandoned the Ellijay application for fear that his further prosecution thereof might be considered as a strike application to protect WCGA's monopoly position in Calhoun ... "

The Review Board, in passing upon these uncontradicted facts of record deals in innuendo and only half of the facts which colors the record against appellant and intervenor. For example, the Review Board concluded, as follows:

> " ... Also, Magill and King failed to establish Ellijay as a potential radio market. Magill testified that he and King had rejected Ellijay as a market in 1958 because they regarded it as too small a community. They claimed that circumstances had so changed since 1958 as to justify filing for Ellijay; however, it was shown that the population in Ellijay during the past ten years had decreased from 1,527 persons in 1950 to 1,320 persons in 1960 ..." (R.397)

In reaching this conclusion, the Review Board makes no mention of the substantial inducements made by Ellijay merchants in September or October of 1960 to have Magill establish a station there. (R. 270) Nor does it mention that neither Magill nor King consulted pertinent statistical indices and therefore were not aware that the Ellijay population had decreased between 1950 and 1960. In fact, the population data concerning Ellijay which the Review Board uses against appellant and intervenor by implication and innuendo is taken from the 1960 United States Census, and there is no evidence that this information was

available to any member of the public in September of 1960.[8]

The Magill-King decision to file for Ellijay was based, in part, on the fact that the WCGA auxiliary studio during 1954 to 1956 had grossed $300 to $400 per week. However, the Review Board rejects the uncontroverted testimony of King and Magill that this was one of the bases for their decision to file for Ellijay *prior* to the filing of the Reliable application for Calhoun by the speculation that: "This decision does not appear to be consistent with economic experience." (R. 397) Just whose "economic experience" the decision is not consistent with, the Review Board does not say. However, it does attempt to justify its speculation on the matter, as follows:

> " ... If Magill were grossing up to $20,800 per year operating a studio in Ellijay only 10 hours per week, would he be expected to incur the additional costs of a separate station with eight employees when, according to the Blue Ridge application, such separate station was expected to gross only $35,000.00 per year. [sic]" (R. 397)[9]

In attempting to justify its own speculation that the Magill decision in September or October of 1960 to file for a station in Ellijay was not consistent with some unidentified "economic experience," the Review Board imputes to *Magill* the *estimate* made by Blue Ridge in its application filed more than six months after Mr. Magill had abandoned his plans to file for Ellijay. In addition, it was not Magill's pro-

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[8] The Examiner made the following fair and correct findings on this point: " ... However, the record does not indicate that the 1960 Census data on Ellijay was available to the public in the early Fall of 1960 when King and Magill originally decided to go into Ellijay, or later in the Fall when King decided to pursue the matter without Magill, and therefore, no inference can properly be drawn from their failure to acquaint themselves with this statistical information." (R. 278)

[9] The Commission's application form requires only an *estimate* by the applicant as to the revenues he expects from his proposed station for the *first* year of operation. Obviously, such an estimate will take into consideration that the first year's revenues will be lower than later years when the station has an opportunity to become better established.

posal but Blue Ridge's application which stated that its Ellijay station would employ eight employees. By imputing to Mr. Magill the proposals contained in the Blue Ridge application while it is discussing its so called findings of fact and without evidence to support its imputations, the Review Board attempts to justify its prejudgment of appellant's and intervenor's "guilt" arrived at by its reliance upon rebuttal testimony alone, the bulk of which was obtained from a completely discredited witness.

In any event, even the Review Board's unsupported speculation on "economic experience" cannot stand the test of logic. If Magill was able to gross $300 to $400 per week by operating a part time studio in Ellijay *only ten hours a week,* it would be completely compatible with his economic experience that he could expect to gross substantially more than that amount by operating a station assigned to that community on a full time basis operating a total of 70 hours each week, or seven times the previous amount devoted to Ellijay.

The fact that the Review Board found it necessary to deal in such gross speculation based upon improper imputations and confusion of fact points up the weakness of its decision.

There are other examples of speculation employed by the Board in reaching its decision. After first admitting that family relationship standing alone, does not, in and of itself, constitute a basis for concluding that the Blue Ridge application was filed to prevent competition to the appellant's station in Calhoun, it later reverses itself by concluding by innuendo that this fact is adverse to appellant. The Board stated:

> " ... Assuming that Acree would not participate in a 'strike' application in order to prevent competition to his prospective in-laws, would he be reasonably expected to compete with them for audience and revenues? We do not believe that such action is consistent with human experience." (R. 398)

There is no evidence in this record to establish the extent of any alleged competition for audience and revenues between intervenor's proposed station at Ellijay and appellant's station at Calhoun. In again dealing in conjecture and surmise and without relying upon one jot or tittle of evidence the Review Board ignored impressive case precedents where the Commission, *en banc*, has approved applications where there would be substantial overlap of *commonly owned* stations and has held that there would be no diminution of competition as a result of such overlap in those circumstances.

In *Knorr Broadcasting Corp. (WKMF)*, 14 Pike & Fischer RR 925 (1958), the Commission granted an application of a station in Flint, Michigan, which resulted in substantial overlap with three other Michigan stations where all four of such stations were commonly owned, to some extent commonly programmed, and where discounts in rates were allowed for buying the commonly owned stations in combination. The Commission found that there would be no diminution of competition between those stations under these circumstances. The Commission in *Knorr* cited several of its decisions to the same effect. *Booth-Radio Stations, Inc.*, 4 Pike & Fischer RR 616 (1948); *Belle City Broadcasting Co.*, 5 Pike & Fischer RR 826 A (1950); *Kokomo Pioneer Broadcasters*, 6 Pike & Fischer RR 285 (1950); and *Beloit Broadcasting Co.*, 7 Pike & Fischer RR 529 (1951).

More recently, in 1961, the Commission granted an application for a new station in Caro, Michigan, which would overlap the service area of Station WWBC, Bay City, Michigan. Station WWBC, itself had originally applied for the facilities at Caro, after an application for those facilities had been filed by another applicant. Later, an employee of WWBC, made known to that station his intentions to apply for the Caro facility. He exchanged with WWBC a stock option which he held on that station for cash and the engineering proposal that WWBC had prepared for its Caro application. Immediately after this transaction with its employee, WWBC dismissed its Caro application. The WWBC em-

ployee also obtained loans from WWBC stockholders to finance his Caro application. On the basis of these facts the Hearing Examiner recommended a denial of the employee's application for the Caro station on the grounds that it would be covertly owned and controlled by his former employer. After pointing out that this conclusion by the Examiner was based upon "circumstantial evidence," the Commission reversed that decision and granted the former employee's application. In so doing, it stated: 'We hold further that the record does not indicate such overlpa of the WWBC service area with that of the proposed Tuscola [Caro] station as to warrant the Examiner's alternative inference that the financial and historical ties between Tuscola and WWBC will significantly detract from the vigor of competition." *Caro Broadcasting Co.*, 20 Pike & Fischer 571 (1961).

Therefore, the Review Board's mere 'belief," that in-laws cannot reasonably be expected to compete in the broadcast business where there is no evidence of overlap between their respective stations is completely contrary to the 'belief" which the Commission has heldand acted upon in situations much more aggravated than that present here. This is another indication of the lengths which the Review Board found it necessary to go in speculation, innuendo and presumption to support its conclusion based upon discredited testimony.

Although much testimony was submitted by three witnesses in this proceeding as to Blue Ridge's choice of the 1500 kilocycles frequency, the Review Board merely rejects this testimony out-of-hand as "not convincing." Such a rejection by a body which never had the opportunity to observe the witnesses. and which did rely upon the testimony of another witness which the trial officer rejected *in toto* as unreliable. is unconscionable.

The Review Board after relying upon the previously discredited Bowman's testimony to establish its adverse decision against appellant and intervenor, next contends that Blue Ridge failed to sustain its

burden of proof in this proceeding. (R. 400) Of course, if the Review Board had not rejected out of hand, without stating valid reasons for this rejection, the testimony of the six witnesses who appeared at the hearing on behalf of appellant and intervenor, it could never have concluded that the applicant failed to sustain its burden of proof.

The Hearing Examiner accepted and considered the evidence offered on behalf of Blue Ridge and Gordon County at the hearing. He made the following correct findings on the matter:

> "No acceptable affirmative evidence on this record establishes that anyone other than King, Acree, Carreker, and the consulting engineer participated in the preparation of the Blue Ridge application..." (R. 272)

After listening to and observing the witnesses who appeared on behalf of Blue Ridge and Gordon County who explained the circumstances surrounding the filing of the Blue Ridge application the Examiner concluded as follows:

> "Thus, although many of the circumstances surrounding the filing of the Blue Ridge application are not necessarily inconsistent with the concept of a strike application, they are also not necessarily inconsistent with the testimony offered by the Blue Ridge and Gordon County witnesses. Although circumstances may, in appropriate cases, provide the best and most probative evidence, they are of value only when, in the experience of reasonable men, they point in one direction and one direction only. Where, as here, the circumstantial evidence is ambiguous and equally susceptible of more than one interpretation, it cannot be held to contradict the unimpeached testimony of the witnesses. It is concluded that the Blue Ridge application was filed in good faith, and not for the purpose of preventing or delaying a grant of the Reliable application." (R. 277).

Unlike the Examiner, the Review Board without stating valid reasons for its action, rejected the unimpeached testimony of the Gordon County and Blue Ridge witnesses, and on the basis of admittedly ambiguous circumstantial evidence and the testimony of a completely discredited witness, concluded that the applicant had failed to sustain its burden of proof. Such a conclusion is capricious and arbitrary and contrary to the evidence of record when considered as a whole, and should be reversed by this court.

In view of the fact that the principal issue in this case is one of credibility which the hearing examiner was uniquely qualified to determine, and since the Review Board reversed the examiner's findings and conclusions on this issue without stating cogent reasons for doing so, it is respectfully requested that this court reverse the Review Board's decision and adopt and reinstate the decision of the hearing examiner as the court did in *N.L.R.B. v. James Thompson & Co., Inc., supra.* It would appear that a remand by the court under the circumstances of this case will offer appellant no relief. The Review Board first decided this case in a decision released on May 7, 1964. (R. 328-343) That decision was even more presumptuous than the one presently before the court, and was appealed to the Commission, *en banc*, by appellant and intervenor herein. The Commission, in an Order released on October 1, 1965, remanded the Decision to the Review Board, and stated the following:

> " ... Upon review, the Commission is of the opinion that the reasons advanced by the Board appear to be inadequate upon which to buttress the use of the presumptions. In addition, it is not self-manifest from the language of the decision (a) whether the Board's decision would be the same without the two presumptions; and (b) whether the Board denied the application essentially on one basic ground, or upon one or more separate, distinct, and unrelated grounds. The Board is directed to clarify and reevaluate its decision in these respects." (R. 387-388)

Less than two weeks later, the Review Board released its second decision which was essentially the same as the first one and which reached the same conclusion. The Board had merely deleted approximately two pages of the first decision which contained "presumptions" against appellant and intervenor, added an introductory paragraph relating the fact that its first decision had been remanded by the Commission, and stated that its conclusion concerning "burden of proof" was a "separate and distinct ground" for denying the Blue Ridge application. The Review Board's second decision was identical with the first in relying upon the discredited testimony of Bowman. The Review Board's action in releasing its second "edited" decision in less than two weeks time, which was identical in all material respects with its first, points up the fact that its conclusions concerning the "bad faith" of appellant and intervenor will not be changed upon remand. It is respectfully submitted that for justice to be served in this case it is necessary for this court to reinstate the Examiner's correct findings and conclusions.

V

APPELLANT IS A PERSON AGGRIEVED OR WHOSE INTERESTS ARE ADVERSELY AFFECTED

The Commission challenges appellant's right to bring this appeal by questioning whether it is a person aggrieved or whose interests are adversely affected within the meaning of Section 402(b) (6) of the Communications Act of 1934, as amended. The Review Board has erroneously decided that appellant, a licensee of the Commission, is guilty of bad faith dealings before the Commission, and that appellant's President has falsely testified before it. These erroneous public attacks upon the character and reputation of appellant and its principals alone make appellant a person aggrieved and whose interests are adversely affected by the Commission action.

Appellant has been the licensee of Station WCGA, Calhoun, Georgia, since 1953. If the erroneous decision of the Review Board is allowed to stand the adverse and incorrect findings contained therein will be expected to lead to other proceedings against appellant, and could be sufficient cause in and of themselves for the Commission to refuse to grant the application of appellant for renewal of its license of Station WCGA, which is presently pending before it.

There is no doubt, in any event, that the Review Board's erroneous findings of bad faith dealing and misrepresentation by appellant will cause the Commission to designate for hearing the presently pending application of appellant for renewal of its license. The Commission has consistently followed a policy of instituting proceedings against its licensees based upon allegations which arise in other proceedings. *The Walmac Co.* FCC 59-1223. Memorandum Opinion and Order released December 9, 1959.

Under the circumstances of this case, if the Review Board's erroneous and improper findings and conclusions remain undisturbed, it will be *impossible* for appellant to get a fair hearing on its pending application for renewal of license.

The history of this proceeding clearly shows that the Commission through its Review Board, always has, does now, and will continue to believe the false allegations and testimony of Bowman against appellant, despite the fact that the evidence shows Bowman to be an extremely biased witness, despite the unimpeached testimony of four witnesses which contradicts Bowman's testimony, and despite the fact that the Hearing Examiner who observed Bowman's performance concluded that Bowman's testimony was "false," "incredible," "evasive," and "unworthy of belief." Under these circumstances appellant could not possibly prevail in the renewal proceeding which is sure to be forthcoming if this erroneous and improper decision remains unchallenged.

Such a renewal proceeding can in no way be truly "de novo" on the facts. After having been well rehearsed by this proceeding and educated to the pitfalls and inconsistencies in his previous testimony, it is clear that Bowman will not make the same mistake twice in his misguided crusade of vindictiveness against appellant at a renewal hearing.[10] Moreover, Commission counsel, in direct examination, with the knowledge derived from this case, will have the full benefit of the errors pointed out in Bowman's previous testimony. In light of these facts, appellant is at this juncture a person aggrieved and adversely affected by the Review Board's decision, which relies chiefly upon Bowman's discredited testimony.

Appellant has already suffered direct punishment as a result of this proceeding and erroneous decision. Appellant's license for Station WCGA expired on April 1, 1964, and the station is operating under temporary authorization. Despite the fact that appellant had timely filed an application for renewal of its license, the Commission, because of this proceeding, has declined to act upon the pending application.

Since the release of the Review Board's decision in this case an application was filed with the Commission on March 25, 1965, by John C. Roach which requests appellant's facilities now assigned to its Station WCGA. This fact further emphasizes that the Review Board's decision in this case has been interpreted in the broadcast industry as tantamount to a denial of appellant's application for renewal of license. In any event, if this erroneous decision by the Review Board is not reversed, the applicant Roach will have a decided and unfair advantage in the comparative hearing that must be held between his application and appellant's application for renewal of license, especially if, as surely will be the case, the Commission's Broadcast Bu-

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[10] Since the Commission's "case" against appellant that it conspired with Blue Ridge in the filing of a strike application cannot stand without Bowman's testimony it is obvious that he will be called again as a witness.

reau urges denial of appellant's application for renewal of its license based upon the Review Board's erroneous decision here.

Appellant will suffer a great injustice if it is not allowed to have this court review the erroneous decision of the Review Board now.

CONCLUSION

It has been shown that the Review Board's decision that appellant and intervenor are guilty of bad faith dealing before the Commission, and that they conspired in filing a "strike application" to protect appellant's competitive position at Calhoun, is based mainly upon the Board's reliance upon the testimony of Richard Bowman, which the Hearing Examiner had rejected completely as "false," "incredible," "evasive," "unworthy of belief" and displaying "malice." It was clearly reversible error for the Review Board to reverse the Examiner's credibility finding as to Bowman without stating sufficient reasons therefor. It is the trier of fact who is uniquely qualified to pass upon the credibility of witnesses. The Review Board's decision cannot stand without its reliance upon the testimony of this completely discredited witness. For these reasons, the ends of justice will best be served in this proceeding by the Court reversing the Review Board's erroneous decision and reinstating the correct decision of the Hearing Examiner as the Court did in *N.L.R.B. v. James Thompson & Co., Inc.*, *United States Steel Co. v. N.L.R.B.*, and

N.L.R.B. v. International Hod Carriers, supra, or by granting such other relief as it deems appropriate.

Respectfully submitted,

GORDON COUNTY BROADCASTING COMPANY

Russell Rowell

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Gordon County Broadcasting Company

Of Counsel

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1023 Munsey Building
Washington, D. C. 20004

April 19, 1965

APPENDIX

STATUTES INVOLVED

The relevant parts of the Statutes to which references are made in Appellant's brief follow:

Administrative Procedure Act 5 USC § 1006(c):

Section 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section —

* * *

(c) Evidence. — Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

* * *

Communications Act of 1934, as amended:

Section 402(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commision.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,165

GORDON COUNTY BROADCASTING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

BLUE RIDGE MOUNTAIN BROADCASTING COMPANY, INC.,
Intervenor.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION
BY ITS REVIEW BOARD.

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

JOSEPH A. MARINO,
Counsel.

Federal Communications Commission
Washington, D.C. 20554

STATEMENT OF QUESTIONS PRESENTED

The question presented, as agreed by the parties in a stipulation approved by this Court on February 23, 1965, is:

Whether the Commission, by its Review Board, erred or was arbitrary and capricious in making findings and conclusions based upon the testimony of a Commission witness which had been rejected in its entirety by the Commission's Hearing Examiner. */

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*/ The Commission reserved the right to question appellant's standing to appeal pursuant to 47 USC 402(b)(6). Without agreeing with appellant's arguments on this point (Br. 43-46), we do not contest its standing to bring this appeal.

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TABLE OF AUTHORITIES

Cases:

Cases (cont'd):

*Cases chiefly relied upon are maked by an asterisk.

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BY ITS REVIEW BOARD.

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant's statement of the case is incomplete and argumentative. We therefore submit the following counterstatement.

This is an appeal pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(6), from a Decision (R. 389-401) of the Federal Communications Commission's Review Board[1/] which denied the application of Blue Ridge Mountain Broadcasting Company, Inc. to operate a standard broadcast station in Ellijay, Georgia.

1/ By Order released Janaury 7, 1965, (R. 439) the Commission denied an application to review the Board's Decision. Pursuant to 47 U.S.C. 155(d)(3), a decision of the Review Board has the same force and effect as a decision of the Commission, unless it is reviewed by the Commission.

The appeal was filed not by Blue Ridge whose application was denied, but by Gordon County Broadcasting Company (WCGA), a party to the proceedings before the Commission.[2/] WCGA, appellant, is the licensee of the only broadcast station in Calhoun, Georgia. Its stockholders are Mrs. Judy Magill (58%); her husband, Robert R. Magill (2%); Wallace Bazemore (30%) and Duncan Bazemore (10%). It appeals because of the findings that WCGA participated in the filing of Blue Ridge's application, and that this application was motivated by an improper purpose, i.e., to obstruct the grant of another application which would have established a competing station in Calhoun. WCGA alleges that these findings, if allowed to stand, jeopardize the license it presently holds.

Background:

On November 8, 1960, Reliable Broadcasting Company filed an application to operate a standard broadcast station on the frequency 1500 kilocycles in Calhoun, Georgia. Some six months later, on June 26, 1961, Blue Ridge (Intervenor) filed its application requesting the same frequency (1500) at Ellijay, Georgia, a community 30 miles away. Because of the interference each would cause to the other, these applications were found to be mutually exclusive, and so were designated for hearing, together with a third application filed by Radio Canton, to determine which should be granted (R. 66-68).

The stockholders of Blue Ridge are Joseph M. Acree (36.4%);

2/ After this appeal was filed, on February 24, 1965, Blue Ridge filed before this Court a Notice of Intention to Intervene.

J.T. Acree (36.4%); Harbin M. King (27.2%). Its application for Ellijay, like all broadcast applications (FCC Form 301) contained this warranty (R. 3):

> THE APPLICANT represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

However, after release of the designation order, allegations were made by Reliable Broadcasting Company, in a petition to enlarge issues, (R. 78-83) that the Blue Ridge application was not filed in good faith, but was instead designed to prevent or impede favorable action on its own application, thus prolonging the monopoly position of WCGA, Calhoun's only station. The following issue was accordingly designated for hearing:

> "To determine whether the application of Blue Ridge Mountain Broadcasting Company, Inc., was filed in good faith or was filed solely or in part for the purpose of preventing or delaying the granting of a construction permit to Reliable Broadcasting Co. at Calhoun, Georgia."

Station WCGA which was alleged to be involved in the improper filing of Blue Ridge's application for Ellijay was made a party to the proceeding (R. 119-121). For the purposes of this appeal, only this issue, commonly called a "block" or "strike" issue, remains relevant.[3/]

3/ Reliable's application was dismissed for failure to publish notice as required by 47 U.S.C. 311(a)(2), and because it failed to adhere to agreements reached at a prehearing conference (R. 111-115, 140-145). Radio Canton voluntarily dismissed its application (R. 268).

An Initial Decision was released August 21, 1963 (R. 267-279), in which the Hearing Examiner concluded that "many of the circumstances surrounding the filing of the Blue Ridge application are not necessarily inconsistent with the concept of a strike application." However, he recommended a grant of the application because the circumstances were "also not necessarily inconsistent with the testimony offered by the Blue Ridge and Gordon County witnesses" (R. 278).

The Commission's Broadcast Bureau filed exceptions (R. 288-307), to which WCGA (R. 309-313) and Blue Ridge (R. 315-316) replied. After oral argument, the agency's Review Board,[4/] on May 7, 1964, released a decision reversing the Examiner's recommendation and denying the application (R. 328-343).

A Joint Application for Review was filed before the full Commission by WCGA and Blue Ridge. They contended that the Board had employed three erroneous presumptions and had erred in basing findings on the testimony of a witness named Richard M. Bowman (R. 360-379). The Commission sustained their contention regarding two of the presumptions, but the Commission did not agree with the contention regarding Bowman's testimony. It remanded the proceeding to the Board for reconsideration of the Decision without two specified presumptions (R. 387-388).

4/ The Commission was authorized to establish a review board by Public Law 87-192, approved August 31, 1961, 75 Stat. 420, 47 U.S.C. 155(d).

Board's Final Decision:

After the remand the Board reconsidered its Decision, modified it in accordance with the terms of the Commission's direction, but concluded nevertheless that Blue Ridge's application should be denied. (R. 389-401). The Board's decision rested on two separate grounds: first, the evidence affirmatively established that WCGA and Blue Ridge had filed a "strike" application; and second, even accepting the Examiner's view of the record, the applicant had not sustained its statutory burden of proof. The essence of the Board's holding was that there was a community of interest between WCGA and Blue Ridge and that one purpose of the Blue Ridge application for Ellijay was to block Reliable's application for Calhoun, thus preserving WCGA's position as the only station in Calhoun. The following constitutes a brief summary of the grounds on which the Board relied:

(1) Business and family ties existed between the principals of Blue Ridge (Acree and King) and those of WCGA (Mr. and Mrs. Magill) (R. 391).

(2) Blue Ridge's application for Ellijay was filed only after notice of Reliable's application for Calhoun had been given, and inevitably had the effect of delaying or preventing competition for WCGA. (R. 391).

(3) Mr. Magill acknowledged his belief that Calhoun could not support a second station (R. 391).

(4) A former employee of WCGA, Richard M. Bowman, testified that Magill and Acree prepared the programming schedule for the Ellijay application, and that they admitted the application was intended to block a grant of the Calhoun application (R. 392).

(5) This testimony was supported by that of another witness, Lyle W. Shuman,who established that Mr. and Mrs. Magill took precautions after the applications had been filed to insure that they were consolidated for hearing (R. 393).

(6) Mrs. Magill did not contradict the validity of Shuman's testimony (R. 393).

(7) The selection of Ellijay, which together with much larger communities had been earlier rejected as too small, was not satisfactorily explained (R. 397-398).

(8) The frequency 1500 kc was applied for, without investigating the possible use of more desirable frequencies which would not have been in conflict with the Calhoun application (R. 398).

(9) Significant conflicts were found in Acree's story regarding the preparation of Ellijay's program schedule (R. 398).

(10) Acree and Magill attempted to conceal and misrepresent facts regarding the preparation and filing of Blue Ridge's application. (R. 401).

The Record Evidence:

Family relationship and other ties existed between Blue Ridge and WCGA. Robert Magill, an experienced broadcaster and engineer, is the president, director, general manager, and minority stockholder (2%) of Gordon County Broadcasting Company (WCGA). His wife is the majority stockholder (58%) of the corporation. Blue Ridge is a corporation owned by Magill's son-in-law,[5/] Joseph M. Acree (36.4%); J. T. Acree, Joseph's father (36.4%); and Harbin M. King (27.2%), WCGA's local attorney in Calhoun. King was also Magill's friend and a potential business partner (R. 269, 391).

Prior Rejection Of Ellijay And Larger Communities. Mr. King practices law in Calhoun, and has performed local legal work for WCGA. He and Magill had become friends and for several years, before 1960, they had sought out communities in which to establish a new radio station. Communities much larger than Ellijay were rejected by the two men, as too small or because a hearing might be necessary (R. 269, 396-397).

In 1958, King and Magill rejected Ellijay as too small to support a radio station. Ellijay's population decreased from 1,527 in 1950 to 1,320 in 1960. Nevertheless, they testified that in September or October of 1960 they decided to apply for Ellijay after some of its merchants offered support for a station in the

5/ At the time Blue Ridge's application was filed (June, 1961), Acree was engaged to Magill's only daughter. They were married two months later (August, 1961).

community, and because of the economic prospects. Mr. Magill said that he tentatively picked the frequency 1500 as the only one available for Ellijay (R. 270, 397).

Reaction To Calhoun Application; Other Possible Frequencies. On learning that Reliable's application had been filed, from a teletype report around Nov. 12, 1960, Magill contacted WCGA's communications counsel, and a consulting engineer (Tr. 161-165). Magill was concerned, because it was his belief that Calhoun could not support a second station. Counsel told him that if Reliable's application was "sound" engineering-wise, it would probably be granted. From his consulting engineer, Magill learned that Reliable's application was indeed "sound" (R. 270, 396).

Based on an abbreviated frequency study, conducted at Magill's request, the consulting engineer reported that use of the frequency 1500 at Ellijay would be mutually exclusive with Reliable's application for Calhoun. He also reported that 1330 and 1340, which are generally recognized as more desirable frequencies, might be available for use but would require further study. WCGA paid for the consulting engineer's report (R. 270, 396). Magill claimed that after receiving this report in November of 1960, he completely abandoned the application for Ellijay, fearing that his participation would be considered a strike to protect his monopoly position in Calhoun. Thereafter, he represented that he had nothing to do with the application "in no manner whatsoever, absolutely none"; (Tr. 112) that Mrs. Magill never asked him to call King about the Ellijay

application; and that the application was never referred to as "our application" or "my daughter's application." (Tr. 165-166, 171-172, 191-196). As will appear later, this testimony was not true.

Concealment Of True Facts Regarding Daughter's Engagement To Acree. When Magill "withdrew" from the Ellijay venture, Joseph M. Acree joined King. At approximately the same time, Acree became engaged to Magill's only daughter. Both Acree and Magill tried to create the impression that the Magills were displeased by the engagement and that Magill "threw Acree out of his house." Their story was contradicted by other witnesses (R. 271), and the Examiner found that during the crucial period when the application was being formulated and filed, the relationship between Acree and the Magills was a close one (R. 272):

> "This conflict is resolved in favor of the finding that between December of 1960 and August of 1961 the Magills were content at the prospect of their daughter's marriage to Acree, and their displeasure and ejectment of Acree from their home arose in August of 1961 when the elopment frustrated Mrs. Magill's plans for an elaborate wedding. This was the impression they created among their associates at the time, and it is not overborn by the contrary testimony of Magill and Acree at this time, when such testimony is calculated to dispel the inference that Acree was in the Fall of 1960 and Spring of 1961 virtually a member of the family. Indeed, the attempt by Magill and Acree to dispell such inference tends to elevate the matter to a significance it might not otherwise have attained." (Emphasis Added.)

No exceptions were taken to this finding, which the Board adopted (R. 390, 401).

More Desirable Frequencies Ignored. On January 6, 1961, King directed the same engineer who had been contacted by Magill to

prepare the engineering portion of the Ellijay application for the frequency 1500. King did not ask for a further study on the frequencies 1330 and 1340, nor did he inquire about the cost of such a study. He had the impression that the probable cost of such a study would be around $2,000 but he had been told by communications counsel that prosecution of an application on 1500 would almost certainly involve a hearing at a cost of $2,000 or $2,500. He was also told that the cost of a vigorously contested hearing could be as high as $4,000 or $5,000 (R. 271, 396). At this time King wrote that Ellijay was a small market economically, and was barely able to support a station (R. 395).

Preparation Of Ellijay Program Schedule. During the time the Ellijay application was being prepared (January to June 1961) Richard M. Bowman was employed by WCGA. He testified that in the Spring of 1961, Magill asked him to type the Ellijay application at WCGA's office in complete secrecy (Tr. 401-403). He was present when the draft programming schedule was worked out by Magill and Joseph Acree (Tr. 405, 458) on the back of WCGA's teletype paper (Tr. 474). Bowman also testified (Tr. 525) that he overheard Magill and Acree discussing the fact that they were filing the

Ellijay application to block Reliable's application for Calhoun [6/] (R. 273-274, 392). There is no question that Bowman did in fact type the application on WCGA's typewriter. The dispute concerns the circumstances surrounding its typing.

Acree denied that Magill helped him prepare the application, asserting that a pencilled draft of the application and program schedule had been prepared in Athens, Ga., with the help of Knox Carreker, an employee of an educational television station (Tr. 304-309). But the only document related to the application that Acree was unable to produce was the draft program schedule (Tr. 905-907). It will be recalled that Bowman had earlier (Tr. 474) testified that the program schedule had been figured on the back of WCGA's teletype paper. Neither Acree or King was able to explain the absence or whereabouts of the draft program schedule (R. 392-393).

6/ Bowman's testimony about Acree's engagement to Magill's daughter, and Mrs. Magill's reaction to the subsequent elopement (Tr. 408-410, 418) is consistent with the Examiner's findings quoted above (supra, p. 9).

All of Bowman's testimony was rejected by the Examiner after "a detailed examination of his testimony". This conclusion was based on three considerations: (1) Bowman's failure to recall how much money was withheld from his pay, a matter which the Examiner recognized was "not relevant to the designated issue"; (2) his mistaken identification of a different program log as the one he had typed for Magill; and (3) Bowman's insistence that he had dictated the text of an affidavit without anyone's assistance and that its contents and phraseology were his own, another matter which the Examiner characterized as "peripheral to the issue to be decided" (R. 274-276).

The Review Board reversed the Examiner because rejection of the entire testimony was not required or warranted by the record. It found that material portions of his testimony were supported by a reliable witness, Lyle W. Shuman, and consistent with the other evidence. Additionally, the Board found several significant contradictions in Acree's own story regarding the preparation of the program schedule which had not been considered by the Examiner in his Initial Decision (R. 395, 398).

Magill's False Claim Of Complete Silence Regarding The Ellijay Application. Magill, as previously noted, (supra p. 8-9) testified that after withdrawing from the Ellijay venture he did not even discuss the application with King or Acree. The Examiner rejected this testimony because:

> "Magill's tale of complete silence and lack of communication on the subject is contrary to normal human experience and actions, and difficult of credence. King and Magill were friends and had a lawyer-client relationship. They live in a small community where they are brought into frequent contact. Even if the most pristine purity should be ascribed to Magill's desire to disassociate himself from what might be regarded as a strike application, it would be unnatural for him not to maintain a rooting interest in an application which might prevent the advent of [competition] in Calhoun. Under the circumstances it would be very strange if Magill did not keep himself abreast of developments through King, and if King did not discuss the matter with the most experienced broadcaster of his acquaintance. There would be no necessary impropriety in such conversations, and, although absent testimony to the contrary, no finding could have been made that they did take place, the claim of complete lack of communication on the subject lacks the ring of truth" (R. 273). (Emphasis added).

No exceptions were taken to this finding, which the Board adopted (R. 390, 401).

Magill's testimony (supra, pp.8-9) was also squarely contradicted by another witness's testimony. Lyle W. Shuman was employed by WCGA during June to December, 1961. Both the Examiner and the Board agreed that he was an unbiased witness "endeavoring to furnish his best and truest recollection". Shuman recalled an incident during his employment at WCGA which contradicted Magill's claim of complete disinterest in the application (R. 272, 393).

The Georgia Association of Broadcasters in its weekly publication has a column listing applications pending before the Federal Communications Commission and giving them numbers showing their processing status. On this occasion the Calhoun application was high on the list, whereas the Ellijay application, which had

been filed later, was lower down the list. On observing this, Mrs. Magill told her husband, in Shuman's presence, to call King, and have him check with Washington counsel to make sure that the two applications would be considered together in a hearing. Magill did make the telephone call in Shuman's presence, and conveyed the message. The following letter dated November 22, 1961, actually written by King to Washington counsel, corroborates Shuman's testimony (R. 272-273, 393):

> "I have learned that another applicant for 1500 kc, 1 kw station [to] be located in Calhoun, Georgia, has received the number 57 rating by the FCC. Of course, we have applied for the same spot on the dial. Please look [into] the matter at the FCC and have our application brought up-to-date. We do not wish to lose any [priority that] we have under the law and I would imagine that this will call for a hearing before the FCC." (Tr. 282-283).

Shuman also testified that he received the impression that Mr. and Mrs. Magill were happy at the prospect of their daughter's marriage to Acree, and that they referred to the Ellijay application as "our application" and "my daughter's application" (Tr. 389-390, R. 271, 393).

In its Decision, from which this appeal is taken, the Board observed that:

> "The 'strike' issue is not one which can be expected to produce unequivocal evidence of intent and motivation. Rather, it is an issue which may be expected to be resolved from acts of commission or omission on the part of persons connected with or interested in the Blue Ridge application. Nor can these acts be considered separately and apart from each other. 'Isolating and evaluating each of the items in this fashion obscures and distorts the overall picture.' In re Howard W. Davis, 36 FCC 507, 508 (1964). It is the collective effect of all of the information which must be considered." (R. 394).

It concluded on the basis of the entire record that Blue Ridge's application should be denied for two separate and distinct reasons: because Station WCGA and Blue Ridge had participated in the filing of a "strike" application to obstruct WCGA's potential competitor; and because the applicant had not satisfied its statutory burden of proof.

In a second joint application for review (R. 409-424) it was again contended that the Review Board should not have relied on Bowman's testimony. The Commission denied review (R. 434) and this appeal followed.

SUMMARY OF ARGUMENT

In denying intervenor's application, the Commission's Review Board found that appellant and intervenor had filed a "strike" application; that is, an application filed not in complete good faith, but instead to obstruct the grant of an application with which it is in conflict. Capitol Broadcasting Co., 29 FCC 677, rec. denied 30 FCC 1 (1961). Here the application which was being obstructed would have brought an end to appellant's monopoly position as the only station in its community. Various ties were shown to exist between the applicant and the station owners. These, together with the pattern of conduct followed by the parties, and their own lack of candor with regard to certain material facts led the Board to conclude that the application had not been filed in good faith. The Board's Decision should be affirmed since it is supported by substantial evidence considered in the light of the entire record. Universal Camera Corp. v. Labor Bd., 340 U.S. 474 (1950).

The Hearing Examiner discredited the entire testimony of one witness. After making its own evaluation of the record, the Board reversed the Examiner finding that some of the testimony of the witness was consistent with and supported by other evidence in the record. Appellant has failed to show that this conclusion was wrong as a matter of law, Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358 (1955); or that it is not justified by the facts in this case. N.L.R.B. v. Pacific Intermountain, 228 F.2d 170 (8th Cir. 1956) cert. denied 351 U.S. 953 (1956).

ARGUMENT

The impression given by appellant's brief is that the Commission's decision rests almost entirely on the testimony of an allegedly discredited witness, Richard M. Bowman. Appellant argues that, as matter of law, the Review Board erred in reversing the Hearing Examiner, who had rejected Bowman's entire testimony. And, without Bowman's testimony, it contends, the Board's Decision is not supported by substantial evidence.

We will show that the Board's evaluation of the disputed testimony was reasonable and that its action in reversing the Examiner was well within its authority. More importantly, as shown in our counterstatement and in the discussion which follows, appellant's argument flows from an inaccurate factual premise. Bowman's testimony was only a small part of the total factual picture on which the Board based its Decision; and the sum total of the evidence clearly establishes that Appellant (WCGA) and Intervenor (Blue Ridge) filed a "strike" application to obstruct a grant to another applicant who would have brought an end to WCGA's monopoly position in Calhoun.

I. THE CONCLUSION THAT A STRIKE APPLICATION WAS FILED BY APPELLANT AND INTERVENOR IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

On the basis of its own evaluation of the record, the Review Board concluded that Station WCGA and Blue Ridge had participated in the filing of a "strike" application, i.e., one designed, inter alia, to prevent or impede the grant of a mutually exclusive application, in this case an application which would have established

a competing station in WCGA's community of Calhoun, Georgia. (R.398). The Board concluded, moreover, that even accepting the Examiner's view of the record it would still conclude that Blue Ridge had not sustained its burden on the "strike" issue (R. 400).

This decision followed a full and fair hearing and the Board's in depth review of the record. It was based on a consideration of all evidence including the finding that Magill and Acree had attempted, at the hearing, to conceal and misrepresent material facts regarding the preparation and filing of Blue Ridge's application for Ellijay, Georgia. On this point, the Board ruled:

> ". . .the lack of candor on the part of Magill and Acree not only constituted part of the total picture of their affirmative participation in the preparation and filing of the Blue Ridge application but it served also to reflect adversely on Blue Ridge's attempt to sustain its burden of proof under the 'strike' issue." (R. 401).

Resolution of the "strike" issue depending as it does on ascertaining the state of mind of the applicant, ordinarily requires the sort of findings which rest "heavily on inference and pragmatic judgment" Cf. Federal Trade Commission v. Colgate-Palmolive Co. 380 U.S. 374, 385 (1965); Communications Assn. v. Dowds, 339 U.S. 382, 411 (1950). To a large extent this was the case here, but since the Board's judgment is supported by substantial evidence considered in light of the entire record (see our counterstatement of the case pp. 5-14), its Decision should be affirmed. Universal Camera Corp. v. Labor Bd., 340 U.S. 474 (1950); Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358 (1955).

The "Strike" Application Problem:

The "strike" application, filed by existing broadcasters in an attempt to prevent or delay competition through the device of a mutually exclusive application, has historically concerned the Commission.

In Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327, (1946), the Commission had expressed concern that if a consolidated hearing was made mandatory in all cases of mutually exclusive applications encouragement would be given to the filing of "strike" applications for the purpose of delaying the licensing of new stations.[7/] Noting that there was no question of good faith in the case before it, the Supreme Court stated:

> "We only hold that where two bona fide applications were mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him. (326 U.S. at 333)

Following the Ashbacker decision, the Commission in 1947 amended its broadcast application form (FCC Form 301) to require a specific representation that the application "is not filed for the purpose of impeding, obstructing, or delaying determination on any application with which it may be in conflict." And, the Commission has reserved the right to make a conditional grant where it appears that a mutually exclusive proposal was not filed in good faith, but was filed for the purpose of delaying or hindering a grant, 47 CFR 1.592(a)(1).

7/ Brief for the Federal Communications Commission in Supreme Court of United States, October Term, 1945, Case No. 65, pp. 12-13, Ashbacker Radio Corp. v. Federal Communications Commission, supra.

Commission condemnation of "strike" applications has also been clearly articulated in adjudicatory proceedings. Thus, in Capitol Broadcasting Co., 29 FCC 677, rec. denied 30 FCC 1 (1961) an application was denied after it was established that a principal had filed a "strike" application in another community. And subsequently, the license which had been issued for the "strike" application was revoked, Roger S. Underhill, 22 Pike & Fischer, R.R. 801, 803-804 (1961). Referring to the representation in the application form regarding the good faith of the applicant, the Commission stated:

> Denial of an application which is filed, in derogation of this representation, as part of a scheme to abuse our processes would obviously be warranted. Revocation of a license which was granted at the time when we were unaware of the applicant's improper design is equally warranted. Communications Act, Section 312(a)(2), 47 U.S.C. §312(a)(2). If we are to fulfill the role which the Act imposes upon us, it is vital that all who deal with the Commission know that the filing of such applications will not be tolerated.

Evidence of a Strike Application in this Case:

As the Review Board observed in its Decision, the strike issue dealing as it does with "intent and motivation" does not usually produce unequivocal evidence, so that the issue must be resolved after analyzing "the collective effect" of all the available evidence (R. 394).[8/] Here, the evidence pointing to a "strike"

8/ Under the Communications Act an applicant must carry the burden of proof as to all issues unless otherwise specified by the Commission. 47 U.S.C. 309(e), Deep South Broadcasting Company v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F.2d (Case No. 18,507, decided April 1, 1965).

application was nevertheless clear and convincing. The Blue Ridge application was filed only after notice had been given that a proposal to establish a service at Calhoun, in competition with WCGA, was on file with the Commission. Blue Ridge was owned by individuals with close ties to the Magills, the owners of WCGA: A 36.4% stockholder, Acree, was engaged to and later married the Magills' only daughter; and a 27.2% stockholder, King, was not only Magill's attorney and friend but had also seriously considered with Magill several opportunities for a joint venture in the broadcast field. The two had in fact weighed the possibility of establishing a station at Ellijay, but this and other larger communities had been rejected as being too small. Several additional communities -- also larger than Ellijay -- had been rejected because a hearing appeared imminent, involving more expense than, in their judgment, seemed warranted. 9/

9/ On this point the Board found as follows (R. 397):

> "Although Magill and King claim that they had planned for some time to file for Ellijay, no substantial work was done on the Ellijay applications until after the Reliable application was filed. In fact, the first steps towards the preparation of the Ellijay application were taken almost immediately after Magill discovered that the Reliable application had been filed. Also, Magill and King failed to establish Ellijay as a potential radio market. Magill testified that he and King had rejected Ellijay as a market in 1958 because they regarded it as too small a community. They claimed that circumstances had so changed since 1958 as to justify filing for Ellijay; however, it was shown that the population in Ellijay during the past ten years had decreased from 1,529 persons in 1950 to 1,320 persons in 1960. On the other hand, the record shows that larger communities had been rejected by them because they were too small or to avoid a hearing." (R. 397).

But notwithstanding this background and despite the fact that Ellijay had actually been decreasing in size, King, together with Acree, chose to precipitate a hearing when they filed an application known to be mutually exclusive with an application already on file, that would for the first time have brought competition for WCGA. The obvious advantage of such an application was that it would delay or prevent the grant of a permit for Calhoun or would -- as apparently happened here -- discourage the prosecution of such application.

These circumstances, we believe, strongly suggest that the Blue Ridge application was not filed in good faith, but was instead designed to block the advent of a second service in Calhoun. However, they constitute only a part of the factual pattern on which the Board relied for its adverse finding. Three additional elements conclusively demonstrate the correctness of the conclusion it reached.

First of all, the record indicates that an application for Ellijay need not have been filed on 1500 kc, the frequency selected by the applicant for Calhoun; but that, on the contrary, several other frequencies might have been available, and that these were more desirable both from the standpoint of propagation characteristics and because they would not engender a conflict with the pending application for Calhoun. Thus, when the Calhoun application was filed, Magill immediately contacted his communications counsel in Washington and a consulting engineer. He learned that the Calhoun application was sound and could be granted, but that an application

for Ellijay on 1500 kc would be mutually exclusive with the Calhoun application. He was told, however, that the frequencies 1330 and 1340, which he recognized as generally more desirable, and which would not have been mutually exclusive with Calhoun, might also be available for Ellijay. 10/ Regarding Blue Ridge's ultimate selection of the frequency 1500 kc, the Board concluded:

> "The facts in this case establish an unusual interest in 1500 kilocycles. Neither Magill, Acree, nor King was able to satisfactorily explain why they would be willing to undergo the expense of a mutually-exclusive hearing without further investigation of other frequencies which they were advised might be available. Magill admitted knowledge that 1330 or 1340 kilocycles might be available for Ellijay. He also admitted that these frequencies might give better coverage than 1500 kilocycles. The testimony that an engineering study of the other available frequencies would have cost as much to accomplish as the costs attendant upon a mutually-exclusive hearing, which is supported only by general assertion and has not been further established, is not convincing." (R. 398).

Secondly, there was the testimony of the witnesses Bowman and Shuman, discussed at some length by the Board (R. 392-395) and in our counterstatement of the case. 11/ Bowman, an

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10/ Magill claimed that on receiving this report he abandoned his plans to apply for Ellijay, fearing that if he filed a mutually exclusive application with Calhoun it would be considered a strike. But, he never explained why, if Ellijay was such a desirable market for a radio station, he never investigated the possibility of using the other frequencies which would not have been mutually exclusive (R. 396, 398).

11/ Appellant challenges Bowman's credibility as a witness. This matter is discussed in Point II of our brief. There is no question, however, as to Shuman's reliability as a witness.

employee of Station WCGA, stated that at Magill's instructions he typed the Blue Ridge application in his office at the station, that the proposed program schedule was worked out by Magill and Acree and that the two had stated in conversations that they were filing the application to block the grant of a second station in Calhoun. Shuman stated that the Blue Ridge application had been discussed in his presence by Mr. and Mrs. Magill and was referred to as "our application". He stated that the Magills had urged King to call his Washington counsel to make sure that everything was being done to assure that the application would be consolidated and set for hearing with the pending application for Calhoun (R. 393).

And finally, both Acree and Magill were shown to have given untrue testimony with respect to the matters in issue. Both the Examiner and the Board held that Magill gave false and misleading testimony, in an effort to dispel the assumption that, by virtue of his engagement to Magill's daughter, Acree's ties with the Magill family were close during the period when the Blue Ridge application was being prepared (R. 272, 390, 400-401). Moreover, it was found that Magill did not tell the truth when he testified that after abandoning interest in the Ellijay venture he did not even discuss the matter with Acree and King; that he never called, or was asked by Mrs. Magill to call, King about the application; and that the application was not referred to as "our application" (R. 273, 401). As the testimony of Shuman, supra, demonstrated, this was simply not so.

Although appellant asserts (Br. pp. 29-43) that the Board's decision is not supported by substantial evidence, nowhere (except with regard to the testimony of Bowman, Point II, infra.) does it challenge the evidence on which the Board relied. Instead, it advances an alternate explanation for the conduct of the parties. But contrary to appellant's assertion, these matters were fully considered by the Board. Its decision sets forth and discusses in some detail (R. 396-398) the evidence offered by appellant as to the circumstances surrounding the filing of the Blue Ridge application. The Board regarded this evidence as unpersuasive, and held instead that it was outweighed by those considerations which pointed to a "strike" application, and that the applicant had failed to meet its burden of proof in this regard.

Additionally, appellant attacks the Board's allegedly improper reliance on the fact that Mrs. Magill was never called as a witness (Br. 31-32). Appellant maintains that counsel for the Commission had indicated that it would be unnecessary to call Mrs. Magill and that therefore it was unjust for the Board to rely on her failure to testify. There is no basis whatever for this contention. Counsel for the Commission's Broadcast Bureau never maintained that Mrs. Magill's testimony was not necessary. The fact is that on February 15, 1963, before the hearing had commenced, the Bureau took the position that based on the pleading, which had resulted in the addition of the strike issue, the testimony of certain named individuals appeared to be necessary (R. 134-136). Mrs. Magill's connection with the Blue Ridge appli-

cation did not come to light until Shuman testified at the hearing on May 17, 1965. Thereafter, appellant received a fifteen day continuance. Subsequently, it presented additional evidence (Tr. 615-958), calling a number of witnesses but not Mrs. Magill.

Appellant also disputes in some detail (Br. pp. 33-35) the order in which the Review Board is alleged to have considered the evidence. There is no question, here, about the failure of the Board to consider something it should have, but only that, according to appellant, the Board considered rebuttal evidence before it considered the direct evidence offered by itself and Blue Ridge. The significance of this argument is difficult to understand. It is, moreover, totally unsupported. It is clear that the applicant had the burden of proof in this proceeding,[12/] and not, as appellant seems to suggest, (Br. p. 34) only the burden of establishing a prima facie case. It is also clear that based on the record as a whole the Board felt this burden had not been discharged. That it chose to draft its decision in a way which set forth those matters it considered adverse to the applicant before discussing those on which the applicant relied seems neither prejudicial to the appellant nor relevant to this appeal. "The parties may not control the exact form or content of a decision." Scripps-Howard Radio, Inc. v. Federal Communications Commission, 89 U.S. App. D.C. 13, 16, 189 F.2d 677, 680 (1951), cert. denied 342 U.S. 830. This we submit is all that is involved here.

12/ 47 U.S.C. 309(e).

It is submitted that the Board fully considered the evidence of record and reached a conclusion reasonably based on that evidence. Appellant is simply asking that this Court consider the record de novo and, substituting its judgment for that of the Board, reach a different result. This, the Court has consistently held, would be an improper exercise of its review powers. The fundamental lack of merit in appellant's case is underscored by the form of relief it has requested (Br. pp. 43, 46): that the Court direct that the Examiners initial decision be reinstated.[13] But the Court cannot "determine the ultimate disposition which should be made [of the case] or direct the Commission how to exercise its discretionary powers." American Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 298, 307, 191 F.2d 492, 501. We believe there is no question but that the Boards action constitutes a permissible exercise of discretion. Its decision ought therefore to be affirmed.

13/ The alleged precedent for this extraordinary request, N.L.R.B. v. James Thompson & Co., 208 F.2d 743 (2d Cir., 1953); and United States Steel Co. v. N.L.R.B., 196 F.2d 459 (7th Cir., 1952), affords no basis for such action here, since the Court's orders in those cases derive from authority conferred by Section 10, National Relations Act, as amended by the Labor Management Relations Act, 29 U.S.C. 151-166.

II. IN THE CONTEXT OF THIS CASE THE BOARD CORRECTLY CONCLUDED THAT A WITNESS'S ENTIRE TESTIMONY SHOULD NOT HAVE BEEN DISCREDITED BY THE EXAMINER.

Appellant contends that as a matter of "basic law" an examiner's credibility findings can only be reversed by an agency for "cogent or compelling reasons" (Br. 14-20) and that the Board erred when it reversed the Examiner's findings regarding Bowman's testimony (Br. 20-29). This appears to be another way of advancing the "clearly erroneous" test which has been rejected by the Supreme Court. Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 492 (1950); Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 363-364 (1955).

These cases stand for the proposition that it is the agency which has the duty of deciding, and that such an obligation is inconsistent with the view that an examiner's findings may only be reversed if clearly erroneous. Universal Camera holds that even though the agency and the examiner disagree, the proper test is whether there is substantial evidence in the record as a whole to support the agency's finding. "The findings of the examiner" the Court said "are to be considered along with the consistency and inherent probability of testimony." (340 U.S. at 492, 496-497). Allentown makes clear that even an examiner's credibility findings which are based on demeanor may be reversed where there is "substantial evidence considering the whole record that can be weighed pro and con . . ." (349 U.S. at 363-364).

Appellant does not assert that the Examiner's credibility findings were based on demeanor. Such a claim would be untenable since it is evident from the Initial Decision that the Examiner's findings were based on his "detailed examination of [Bowman's] testimony" (R. 273). Therefore, no special weight attaches to his findings since the Board can also make its own detailed examination of the testimony and draw its own inferences. Cf. Warehouse & Mail Order Employees v. N.L.R.B., 112 U.S. App. D.C. 280, 302 F.2d 865 (1962); International Woodworkers of America, AFL-CIO v. N.L.R.B., 104 U.S. App. D.C. 344, 262 F.2d 233 (1958); 2 Davis, Administrative Law, 10:04 (1958) cited in Alcoa Steamship Company, Inc. v. Federal Maritime Commission, 116 U.S. App. D.C. 143, 145-146, 321 F.2d 756,758,759 (1963).

Strong reliance is placed by appellant on N.L.R.B. v. James Thompson & Co., 208 F.2d 743 (2d Cir. 1953). However, the same court in N.L.R.B. v. Jackson Maintenance Corporation, 283 F.2d 569 (2nd Cir. 1960) expressly limited the scope of its Thompson decision in terms that are particularly relevant here:

> "Because he has the opportunity to observe the demeanor of a witness the credibility to be accorded a witness is ordinarily a matter for the trial examiner. N.L.R.B. v. James Thompson & Co., 2 Cir., 1953, 208 F.2d 743. But an examiner's findings, based upon his opinion of credibility, are not necessarily to be taken as determinative, for the record on review may well create doubts with respect to the truthfulness of a witness so powerful that they outweigh any evaluation based upon demeanor. N.L.R.B. v. James Thompson & Co., supra, at page 746."

See alse Utica Observer-Dispatch, Inc. v. N.L.R.B., 229 F.2d 575, 577 (2nd Cir. 1956).[14]

In his Initial Decision the Examiner discredited all of Bowman's testimony after concluding that he had proven to be unreliable on several points, most of which were collateral to the basic issue. (Supra, p. 12) While conceding that there might be truth in Bowman's testimony, he made no effort to sift out the truth (R. 274-276). To the Review Board it appeared that the Examiner had mechanically applied the maxim falsus in uno, falsus in omnibus. It found fault with his approach which failed to consider the consistency and inherent probability of Bowman's testimony in the light of the other evidence in the record. Cf. Communist Party of United States v. Subversive Activities Control Board, 107 U.S. App. D.C. 279, 283-284, 277 F.2d 78, 82-83, aff'd 367 U.S. 1 (1961), where this Court held that discrepancies in a witness's testimony were "not such as to indicate perjury, much less the habit of perjury essential to be shown to taint all the witness's testimony." (Emphasis added). And in affirming this Court's decision the Supreme Court, 367 U.S. at 28, concluded that "These are questions which can best

14/ Another Federal Court has stated in a criminal case that:

> "Credibility involves more than demeanor. It apprehends the overall evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. U.S., 314 F.2d 718, 749 (9th Cir. 1963) cert. denied sub nom. Palermo v. U.S., 377 U.S. 953, rehearing denied 377 U.S. 1010 (1964).

be answered by those entrusted with ascertaining the fact; that is, the tribunal that conducts the hearing and passes judgment on the reliability of the witness in the light of his total testimony and its relation to. . .the administrative transcript."

On the record in this case the Board had to make a choice. On one side it had Bowman's version of the circumstances surrounding the typing of Ellijay's programming schedule, and, on the other side it had the version of Magill and Acree.

Both the Examiner and the Board found that Acree and Magill had attempted to withhold and distort material facts, (supra, pp.9,13). On the other hand some of Bowman's testimony had proven to be correct. (supra, p. 11), and the Board found that Bowman's testimony was supported by Shuman who established that even after the application was filed, Mr. and Mrs. Magill took an active interest in the Ellijay application and acted to insure a hearing with the Calhoun application. Bowman's testimony was not only found to be consistent with the other evidence, but it was also inherently probable. Thus, in preparing and computing the program schedule -- perhaps one of the most difficult portions of the application -- it would be entirely natural for Acree to seek the aid of his prospective father-in-law, an experienced broadcaster.

Some major flaws were also found in Acree's own story about the preparation of the program schedule. Acree testified that he had prepared a pencilled draft copy of the application and program schedule with the help of Knox Carreker. Then he went to Bowman's home at a certain address in Calhoun and asked him to type the material. Later,

he picked up the material at the same place. (Tr. 304-307). This was the same story Acree had told in an affidavit which had been previously filed with the Commission (R. 99). But after Bowman testified that he lived at a different address (Tr. 497) Acree returned to the stand and changed his testimony, (Tr. 900-901). Acree was also unable to produce the pencilled draft of the program schedule after Bowman testified that it had been computed on WCGA's teletype paper. (R. 392-393). Other inconsistencies in his testimony were succinctly set forth by the Board:

> Acree testified that one, Carreker, whose broadcast experience was mainly technical, had assisted Acree in preparing his pencilled draft of the Blue Ridge application form and program schedule. Carreker was shown a copy of the purported handwritten Sections of Form 301 and he was unable to identify this material as the draft copy he had assisted Acree in preparing. He was also shown the program schedule typed by Bowman and while he identified certain programs as those which he and Acree had discussed in Athens during the months of January and February, 1961, he could not identify this document as the one they had prepared. Acree testified that Carreker aided him in computing the percentages in the program breakdown and analysis in Section IV of Form 301. However, Carreker testified that he had personally never filled out this portion of the application form and that he did not recall helping Acree with the mechanics of computing these program percentages. (R. 398).

Nowhere in its Brief does appellant dispute the accuracy of these findings, or attempt to explain the inconsistencies and lack of candor in the testimony of Acree and Magill. Instead it tries to paint Bowman as a biased, disreputable and unreliable character. But even if this were completely true, and it is not, the inconsistencies and misrepresentations on Acree's and Magill's

part would still remain.

Bowman was mistaken when he identified a program schedule as the one he had typed at Magill's request; but no one has ever contended that Bowman did not in fact type the program schedule. (supra, p. 12). His insistence that he personally dictated his affidavit, including the legal phraseology, is surely "peripheral to the issue to be decided" as the Examiner, himself, recognized. The only remaining matter reflecting on Bowman's credibility is the fact that on August 12, 1961 Magill swore out a warrant for larceny after trust against Bowman. But all the parties including appellant stipulated that this matter did not reflect on Bowman's "character for candor, truthfulness, honesty, integrity, veracity and general good character". (Tr. 611-612). And any possibility of bias raised by this incident was dissipated by the fact that after the warrant had been issued, Bowman was asked to return to work at Station WCGA, by Mrs. Magill, and continued to work there until October 20, 1961 (Tr. 533-534). Appellant did not dispute Bowman's testimony that he never took anything from the station that did not belong to him (Tr. 418-419), nor did it dispute the fact that Bowman frequently visited the Magills' home, and had been given keys to their house, car and business establishment. (Tr. 397).

We submit that these facts do not support the portrait of a disreputable and completely unreliable character that appellant now seeks to paint. Furthermore, it is significant that the Review Board, after a detailed examination of all the evidence became convinced that Bowman's testimony in specific areas was reliable, supported by, and consistent with other evidence in the record.

In reversing the Examiner, the Board cited the Allentown case supra as well as N.L.R.B. v. Pacific Intermountain, 228 F.2d 170, (8th Cir. 1956), cert. denied 351 U.S. 953 (1956). The facts in this proceeding are similar to Pacific where the Labor Board reversed an examiner's credibility findings, and was affirmed. There as here the agency had to choose between the testimony of two witnesses on one side, and one witness on the other. There as here the agency accepted the testimony of the one witness, who had been discredited by the examiner. The Labor Board noted that on the one occasion provided by the record where the truth or falsity of conflicts between material portions of the witnesses' testimony could be objectively tested, the two witnesses were proven false.

Similarly, in this case Bowman's testimony regarding the relationship between Acree and Magill was proven to be true whereas Acree and Magill attempted to conceal and misrepresent these material facts. In addition, Bowman's testimony was found to be consistent with the other evidence and supported by an unbiased and truthful witness, while significant contradictions were found in Acree's own version of the facts.

The Communications Act was amended in 1961, so that the Commission could delegate review functions to "experienced and technically qualified personnel."[15] In the exercise of this function, the Board as the decisional authority within the agency, has the power to reverse an examiner's findings, as to lack of credibility if it concludes that testimony is inherently probable or consistent with the other evidence in the record.[16] It correctly exercised this authority in the context of this case, and on two different occasions the full Commission refused to reverse the Board on this point. It is noteworthy that on the first application for review, the Commission remanded the proceeding to the Board for reconsideration without the use of two specific presumptions which had been used in the Board's first Decision (R. 387-388). The Commission, however, although asked to do so by appellant, did not disturb or find fault with the Board's reliance on Bowman's testimony. (See Counterstatement, pp. 4, 15).

15/ Public Law 87-192, was approved August 31, 1961, 75 Stat. 400, 47 U.S.C. 155(d). "The purpose of this legislation is to modify the Communications Act of 1934 so that the Federal Communications Commission will be able, by making better use of its experienced and technically qualified personnel, to handle its large workload of adjudication cases with greater speed and efficiency than is presently possible." House Report No. 723, 87th Cong., 1st Sess., p. 1; see also S. Report No. 576, 87th Cong., 1st Sess., p. 5, Conference Report No. 996, 87th Cong., 1st Sess., p. 6. 47 CFR 0.365(a) authorizes the Board to review initial decisions. See Report and Order, 27 F.R. 5671, June 14, 1962, establishing the Review Board, and Report and Order, 29 F.R. 6441, May 16, 1964, expanding its authority.

16/ 47 U.S.C. 155(d)(3) provides:

> Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4), shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission. (Emphasis added.)

CONCLUSION

For the foregoing reasons, the decision in this case should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D. C. 20554

May 28, 1965

APPELLANT'S REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,165

GORDON COUNTY BROADCASTING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

BLUE RIDGE MOUNTAIN BROADCASTING COMPANY, INC.,

Intervenor.

Appeal From Decision and Order of the Federal Communications Commission

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REPLY TO APPELLEE'S COUNTERSTATEMENT OF THE CASE

Appellee, the Federal Communications Commission, claims that appellant's statement of the case is "incomplete and argumentative," and therefore appellee submitted its own version of the facts. Nowhere in its brief does appellee specify how or in what particulars appellant's statement is argumentative or incomplete. Significantly, it does not contest the accuracy of appellant's statement. By quoting out of context, by juxtapositioning unrelated portions of testimony, and by presenting only

half of the facts in a given area, appellee presents an inaccurate counterstatement of the case to this court. Appellant, therefore, is compelled to point out the areas where appellee's counterstatement is misleading.

Appellee conveniently omits the fact, on page 3 of its brief, that the "strike application" issue was added by the Review Board solely on the basis of the allegations contained in the affidavit of Richard Bowman, a former employee of appellant. Because of the later history of the Review Board's action in this case, this fact is essential to a proper consideration of this case.

At the time the Review Board relied upon the Bowman affidavit in adding the "strike application" issue to the proceeding and ordering that appellant be made a party to this proceeding, it had more than ample evidence before it that Bowman's motives, to say the least, were biased, and that his reputation for truth and veracity in his own community was not good. (Appellant's Brief, pp. 4-6)

Furthermore, it was proved at the hearing that Bowman, in his affidavit, swore to the truth of statements concerning matters of which he had absolutely no knowledge. Later, Bowman's entire testimony was rejected by the Examiner, who observed him in his performance, as being unbelievable. The Review Board reversed the Examiner's credibility findings on Bowman and based its decision, in principal part, upon this rejected testimony. Thus, in effect, the Review Board attempted to vindicate itself for having relied upon Bowman's untruthful allegations in the first instance. The full facts surrounding Bowman's affidavit and the reliance upon it by the Review Board are set forth in Appellant's Brief at pages 4 to 6, and 21 to 22.

The statement at page 4 of appellee's brief concerning the "reasons" given in the Examiner's decision is misleading. The quotation from the Initial Decision is out of context, and it is not the sole basis for the Examiner's conclusion that appellant and intervenor did not engage in fil-

ing a strike application, as appellee's statement would lead one to believe. The remarks of the Examiner quoted by appellee refer only to his discussion of the circumstantial evidence in the case. The Examiner's full remarks in this regard are as follows:

> "Thus, although many of the circumstances surrounding the filing of the Blue Ridge application are not necessarily inconsistent with the concept of a strike application, they are also not necessarily inconsistent with the testimony offered by the Blue Ridge and Gordon County witnesses. Although circumstances may, in appropriate cases, provide the best and most probative evidence, they are of value when, in the experience of reasonable men, they point in one direction and one direction only. Where, as here, the circumstantial evidence is ambiguous and equally susceptible of more than one interpretation, it cannot be held to contradict the unimpeached testimony of the witnesses. It is concluded that the Blue Ridge application was filed in good faith, and not for the purpose of preventing or delaying a grant of the Reliable application [emphasis added]." (R. 277)

Prior to his discussion of the circumstantial evidence quoted above, the Examiner considered and carefully weighed the testimony of all of the witnesses in this proceeding. Based upon the Examiner's careful consideration of such testimony, and his observance of the witnesses' demeanor at the hearing, he rejected in its entirety the testimony of the Commission's principal witness and concluded as follows:

> "No acceptable affirmative evidence on this record establishes that anyone other than King, Acree, Carreker, and the consulting engineer participated in the filing of the Blue Ridge application . . . ." (R. 272)
>
> * * *
>
> "The strike application issue is not simple of resolution. On the one hand is the version of events offered by the Blue Ridge and Gordon County witnesses. They have testified as to Magill's and King's interest in and

search for a community in which to establish a broadcast station; of their solicitation by local Ellijay merchants and the inducements offered them if they would come to Ellijay; and of their opinion that new construction and industries in the area offered a promising market. They have also explained how the filing of the Reliable application led Magill to believe that he could not proceed with the Ellijay application without being suspected of trying to block Reliable, but how King's long standing desire to get into the radio business motivated him to persevere. They have testified as to how and by whom the application was prepared, and they have denied that Gordon County or any of its principals has participated in the affair.

"The foregoing testimony has not been impeached in any material aspect by the credible testimony of any other witnesses . . . ." (R. 276)

The full facts concerning the basis for the Examiner's decision are much different from the picture which appellee presents in its brief.

The statements concerning Mr. Magill's "reaction" to the Reliable application at page 8 of appellee's brief are misleading. There is no evidence in this record that Mr. Magill was "concerned" about the Reliable application on November 12, 1960, the day he learned of it, "because it was his belief that Calhoun could not support a second station. [emphasis added]" These statements in appellee's brief are a juxtapositioning of two entirely unrelated portions of the testimony of Mr. Magill. Mr. Magill testified about the events of November 12, 1960, on the morning of May 15, 1963 (Tr. 129). Several hours later, in the afternoon of the same day, in an entirely unrelated context, under cross-examination by Broadcast Bureau counsel, Mr. Magill testified as follows:

"Q. Do you think that Calhoun could support two stations?

"A. No, sir; not satisfactorily." (Tr. 172)

The attempt by appellee in its brief to relate that testimony on May 15, 1963, as a cause of "concern" on Mr. Magill's part on November 12, 1960, which led him to take certain actions is misleading.

The statement on page 11 of Appellee's Brief that Mr. Acree was unable to produce the draft program schedule is totally without significance in this proceeding. It is merely an attempt, by innuendo, to cast appellant and intervenor in an unfavorable light. There was absolutely no reason why Mr. Acree should have retained the document referred to. It was a mere penciled draft. There is no Commission rule or industry practice that such documents be retained and broadcasters do not ordinarily retain such rough drafts.

The Review Board based its first decision of May 7, 1964, in part, upon its employment of an adverse presumption against appellant and intervenor for the failure to produce this pencil draft at the hearing. (R. 328-43) On Review, the Commission, *en banc*, specifically ruled that the employment by the Review Board of its adverse presumption in this regard was "unwarranted." (R.387-388)

The Review Board's "edited" decision released on October 13, 1964, deleted the unjustified presumption previously employed against appellant and intervenor on this matter, but retained in its decision the immaterial fact that the pencil draft was not produced at the hearing. That both the Review Board and appellee in its brief insist upon presenting this matter, after the Commission has ruled that it has no decisional value whatever, only points up the fact that the Board's decision is based upon improper innuendo, and cannot be supported by the material evidence of record considered as a whole.

The remainder of appellee's counterstatement devoted to the so-called "grounds" for the Review Board's decision and the "record evidence" is likewise a biased, highly colored skein of half-fact and out-of-context presentation. Other misleading statements in appellee's brief will be discussed later in this reply.

REPLY TO ARGUMENT

Appellee evades, until the very end of its brief, discussing the principal issue of law presented by this case, namely, the arbitrary reversal by the Review Board of the Examiner's adverse credibility findings on the Commission's star witness, and the Board's reliance upon the incredible testimony of this witness upon which its decision turns.

Without first discussing any reason for reversing the Examiner's rejection of Bowman's testimony, the Board made findings adverse to appellant based upon this totally discredited testimony. Based solely upon Bowman's false testimony and ambiguous circumstantial evidence, the Board reversed the Examiner, and concluded that appellant had participated in the filing of a strike application. The Review Board states its grounds for this conclusion as follows:

> ". . . This conclusion is based on the timing of the filing of the Blue Ridge application, the relationship of the Blue Ridge principals to the Magills, on Bowman's testimony concerning Mr. Magill's preparation of Blue Ridge's proposed program schedule, on Shuman's testimony, and on the failure of Mrs. Magill to testify in the proceedings . . . ." (R. 394)

Of these five grounds,[1] the Review Board admits that Bowman's testimony is the keystone of its decision, when it states:

> "While the timing of the filing of said application, the identity of the parties thereto and the adverse effect it had on the opportunities of the Reliable application do not, in and of themselves, constitute a basis for concluding that the Blue Ridge application was filed to prevent competition to the Magills station in Calhoun, they remain before us as factors for possible future consideration . . . ." (R. 391)

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[1] Appellee's brief claims ten grounds for the Review Board's decision.

> ". . . We agree that family relationship, business privity or friendship, standing alone, does not prove that a block application has been filed, or that the conversations which Shuman overheard may not be entirely sufficient, in themselves, to establish a concert of action between Magill and King . . . ." (R. 400) [2]

The above quotations from the Review Board's Decision indicate that of its original five grounds, its decision rested principally on the following two grounds: (1) Bowman's testimony concerning Mr. Magill's preparation of Blue Ridge's proposed program schedule; and (2) the fact that Mrs. Magill did not testify in this proceeding.

The reasons why Mrs. Magill did not testify are set forth in appellant's brief at pages 6, 7, 31, and 32. From the very beginning of this case the Commission's Broadcast Bureau has maintained that ". . . the testimony of only four persons" was necessary for resolution of the strike application issue. (R. 135, emphasis added) Although the Commission's Broadcast Bureau named the only four persons it said would be necessary for resolution of this issue, Mrs. Magill was not included in this group. In effect, appellee denies in its brief that the Commission's Broadcast Bureau made these representations. Appellant stands on the facts set forth in its brief concerning this matter which are supported by citations to the record. For the reasons set forth in appellant's brief it was unjust for the Review Board, in light of these circumstances, to ground its decision in any respect upon the use of an adverse presumption against appellant and intervenor because Mrs. Magill did not testify.

It is clear from the Board's own admissions that its decision also rests principally upon the testimony of the Commission's star witness,

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[2] The Review Board appears to agree here with the Examiner's conclusion that ambiguous "circumstantial evidence" is not sufficient grounds to support an adverse decision as to appellant and intervenor. (*Cf.* p. 3, *supra*.)

Richard Bowman, which testimony was rejected by the Examiner, *inter alia*, as "false," "incredible," "evasive," and "unworthy of belief." Therefore, the principal question presented to the Court is whether the Review Board can arbitrarily, and without stating sufficient reasons therefor, reverse its Examiner on a determination of credibility of a witness, where credibility is the principal issue to be determined in the case.

Appellee nowhere meets the legal arguments advanced by appellant in its brief. Instead it engages in misstating those arguments and the facts of this case.

For example, at page 29 of appellee's brief it states that "Appellant does not assert that the Examiner's credibility findings were based on demeanor. Such a claim would be untenable since it is evident from the Initial Decision that the Examiner's findings were based on his 'detailed examination of [Bowman's] testimony.'"

The extensive findings which the Examiner made on the incredibility of the Commission's witness, Bowman, which are quoted in appellant's brief, show that the Examiner based his rejection on that witness' testimony, not only upon his consideration of its patent and obvious falsity, but also upon his observance of Bowman's demeanor at the hearing. On page 24 of appellant's brief the following quotation from the Examiner's decision is set forth: ". . . this witnesses [sic] demeanor displayed unusual sensitivity and response to real or imagined abuses or implied doubts as to his veracity. [emphasis added]" Although appellant supplied italics to this phrase in its brief, appellee apparently chose to overlook this significant statement by the Examiner, and now claims that the Examiner's rejection of Bowman's testimony is not based upon his observance of Bowman's demeanor. Its statement of the facts is clearly erroneous. Throughout appellant's brief, it is emphasized that where, as here, credibility is the principal issue to be decided, the Review Board, which must rely upon the cold record, should not, as it did,

arbitrarily overrule a trial examiner on the issue of the credibility of a witness, since it is the trial examiner who has the superior advantage of observing the witness at the trial.

It appears that the Review Board was aware that the Examiner's rejection of Bowman's testimony was based, in part, upon demeanor findings, when it states, without explanation or reasons, simply that it ". . . is not bound by the Examiner's credibility and demeanor findings." (R. 395) In support of this bold assertion it cites *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 75 S. Ct. 855, 99 L. Ed. 1147 (1955), and *National Labor Relations Board v. Pacific Intermountain Co.*, 228 F.2d 170 (1955). Appellant's brief clearly points out (p. 28) that those cases are not in point here, since neither dealt with situations where credibility was the principal issue to be decided. However, since appellee in its brief also places principal reliance upon those cases it appears that further exposition is required.

In *Pacific Intermountain, supra*, the Court clearly stated, at p. 171, that the question of whether the Board's reversal of certain credibility findings of the trial examiner was warranted was a "subsidiary question." The Court there also stated that even if the Board had accepted the trial examiner's credibility findings it still had sufficient and substantial evidence of record when considered as a whole, to reverse its examiner's ultimate conclusions. Here, credibility is the principal issue to be decided, and an analysis of the Review Board's decision shows that it cannot be supported without its reliance upon the testimony of Bowman which the Examiner had rejected.

Likewise, in *Allentoun, supra*, the credibility issue was not germane to the crucial determination made in that case. That case involved competing applicants for the same facilities. One applicant proposed a second local broadcast station for Easton, Pennsylvania, and the other proposed to use the same facilities to provide a third local broadcast station for Allentown, Pennsylvania. The Hearing Examiner recom-

mended a grant of the Allentown proposal, based upon evidence that the Easton's applicant's principals gave unreliable testimony as to their abilities to meet the needs of the Easton community. The Commission, *en banc*, reversed its Examiner on the grounds that the "decisive factor" in the case was not the ability of competing applicants to meet the needs of their respective communities, but rather, which of the communities was most in need of the proposed additional service. On this basis alone, the Commission awarded a grant to the Easton applicant since that community had only one standard broadcast station then operating whereas Allentown already had three such stations.

On appeal, this Court disagreed with the Commission's legal theory and remanded the case with instructions to reevaluate the "issue of the relative abilities of the two applicants to serve in the public interest." *Allentown Broadcasting Corporation v. Federal Communications Commission*, 222 F.2d 781 (1954).

The Supreme Court granted certiorari. Before that Court the Commission argued that when mutually exclusive applicants seek authority to serve different communities the Commission must first determine which community has the greater need for the service without regard to the applicant's ability to meet those needs. If it were otherwise, argued the Commission, the needs of the community would be subordinated to the ability of an applicant for another locality. The Supreme Court agreed with the Commission's theory.

Therefore, it is clear, that in the *Allentown* case, the credibility of the Easton applicant's principals was not the principal issue to be decided. A much different situation is presented here where credibility is the principal and only issue to be decided. Therefore, the *Allentown* case is clearly distinguished on its facts and does not apply here.

Appellee also places principal reliance upon *Communist Party of United States v. Subversive Activities Control Board*, 107 U.S. App. D.C. 279, 799 F.2d 78, aff'd, 367 U.S. 1 (1961), ostensibly to support its erro-

neous argument that the Review Board can arbitrarily and without explanation reverse a trial examiner on credibility and demeanor findings. The *Communist Party* case, *supra*, is not even remotely in point. There, the Board supported its trial examiner in his credibility findings, which is the completely opposite fact situation from the present case.

Other cases which appellee relies upon do not support its position that an administrative agency can arbitrarily and without reason reverse its trial examiner on the question of credibility when credibility is the principal issue to be decided.

For example, in *Warehouse & Mail Order Employees v. National Labor Relations Board*, 112 U.S. App. D.C. 280, 302 F.2d 865 (1962), this Court twice specifically pointed out, at pages 866, 869, that credibility was not the issue in the case. Likewise, in *Alcoa Steamship Company, Inc. v. Federal Maritime Commission*, 116 U.S. App. D.C. 143, 321 F.2d756 (1963), this Court specifically pointed out (footnote, p. 758) that "The credibility of witnesses was not involved." Obviously, those cases are inapposite here where credibility of witnesses is not only "involved," it is the principal issue to be decided in the case.

Although appellee claims that the case of *National Labor Relations Board v. James Thompson & Co., Inc.*, 208 F.2d 743 (1953), relied upon by appellant in its brief, was expressly limited in scope by *NLRB v. Jackson Maintenance Corporation*, 283 F.2d 569 (1960), it nowhere contends that the *Thompson* case, is not applicable to the present case. More importantly it does not refute, or even discuss, the other strong case precedents cited and discussed at length in appellant's brief. *United States Steel Co. (Joliet Works) v. National Labor Relations Board*, 196 F.2d 459 (7th Cir. 1952); *National Labor Relations Board v. Local 160, International Hod Carriers, Building & Common Laborers Union of America, AFL-CIO*, 268 F.2d 185 (1959); *National Labor Relations Board v. Dinion Coil Co.*, 201 F.2d 485 (1952). This failure to meet appellant's legal arguments is a concession by the appellee of their controlling validity here.

Appellee's brief glosses over the detailed findings of the Examiner[3] upon which he relied in concluding that the Commission's principal witness, Bowman, "displayed malice," "a willingness . . . to swear to facts which he believes will aid the cause he has adopted with utter indifference to the truth or falsity of his oath," ". . . a willingness to conform his 'recollection' to what he believed to be independent evidence of his testimony," and that his testimony was "false," "incredible" "evasive" and "unworthy of belief."

In the face of these most damaging findings, appellee has the temerity to claim that ". . . these facts do not support the portrait of a disreputable and completely unreliable character that appellant now seeks to paint" (Appellee's Brief, p. 34, emphasis added). The unreliable character of the Commission's star witness, was shown by his own false and incredible testimony detailed in the Examiner's decision which compels the conclusion that this testimony must be rejected.

The Examiner gave many, many examples to show the inherent falsity of Bowman's testimony and then stated the following:

> "The foregoing examples do not exhaust the inconsistencies or inaccuracies in Bowman's testimony, but they are deemed illustrative thereof, and, by themselves, are considered sufficient to require the rejection of Bowman's testimony . . . ." (R. 276)

Obviously, the Review Board was not satisfied with the many examples given by the Examiner, although it refused to discuss them. However there are more examples from the evidence of record which can be given to further support the Examiner's rejection of Bowman's testimony.

Although Bowman displayed a remarkable memory in his unhesitating castigation of appellant's and intervenor's principals on direct ex-

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[3] The Review Board also refused to discuss the Examiner's detailed findings as to Bowman's credibility.

amination, this facility appeared to atrophy dramatically during his testimony on cross-examination.

Bowman, under cross-examination, answered no less than sixty-six questions put to him with the unresponsive "I don't recall." (Tr. 425, 445-47, 449, 464, 469, 473, 480, 489-91, 495, 496, 502-04, 508, 509, 516, 518, 522, 536-38, 583, 604).

In fact, Bowman was so evasive under cross-examination that he at first even refused to disclose his occupation, until directed to do so by the Examiner. (Tr. 427-43)

Two witnesses, Mr. Magill and Mr. Acree, directly refuted Bowman's testimony concerning the circumstances surrounding the preparation of the Blue Ridge application. In addition, two other witnesses directly refuted Bowman's testimony in material respects. Bowman unequivocally denied that he had told a Mr. George Hayes on or about September 22, 1962 (two weeks after Bowman signed the affidavit which precipitated the "strike application" issue) that he, Bowman, was going to work for Reliable Broadcasting Company (whose application, according to Bowman, appellant and intervenor were trying to block). (Tr. 431-36)

Mr. Hayes' later testimony directly refuted Bowman's testimony in this regard and stated that Bowman told him on September 22, 1962, that he was going to work for Reliable at Calhoun, Georgia. (Tr. 715-20) A Mr. Larry Stanfield who was present when Mr. Hayes had this conversation with Bowman, substantiated Hayes' testimony in direct refutation of Bowman's testimony. (Tr. 847-49)

The Review Board rejected the testimony of these two witnesses which contradicted the Commission's star performer.

In a footnote, the Review Board stated:

> "Hayes' testimony was offered to show that Bowman's prior affidavit and his testimony at the hearing

> were induced by his contemplated future employment with Reliable. However, as we have seen, Reliable's application was dismissed before Bowman testified at the hearing." (R. 395)

The facts are that Bowman decided to make known his story concerning appellant's so-called participation and purpose in intervenor's "strike application" at the inspiration of one John C. Roach. Roach and Bowman, according to Bowman's repeated testimony, are "real good friends." (Tr. 566-71, 591-92)

Although it is true that Reliable's application was dismissed, over its protests, before Bowman testified at the hearing under subpoena by the Commission, it is also true that Bowman gave his affidavit which precipitated the "strike application" issue against appellant and intervenor long before that time, while Reliable was still very active in the case.

More importantly, it appears that Bowman's tale, instigated at the insistence of his "life-long friend" Johnnie Roach, had its intended effect after all. After the Review Board relied upon Bowman's incredible story and erroneously found that appellant had engaged in filing a strike application, Bowman's "close friend" Johnnie Roach filed an application requesting appellant's facilities for a radio station at Calhoun, Georgia. The application is presently pending before the Commission, and will require a hearing with appellant's application for renewal of license of Station WCGA. Mr. Roach is represented in his application for appellant's facilities by the same Washington, D. C., law firm which represented Reliable.

Appellee's brief (p. 34) indicates that only two witness' testimony was in conflict with Bowman's testimony. This is not correct. Messrs. Magill, Acree, Hayes, and Stanfield, directly and unequivocally contradicted the testimony given by Bowman. Therefore, aside from the showing above that the *Pacific Intermountain* case is inapposite here, the es-

sential difference in facts between that case and this one further distinguishes them. Appellee's argument (p. 34) that the two cases are similar in facts is in error.

Appellee argues that Bowman's testimony regarding the criminal warrant issued against him on complaint of appellant's president in no way shows bias and does not reflect upon his character for "candor, truthfulness, honesty, integrity, veracity and general good character." (Appellee's Brief p. 33) Evidence concerning the charge of the warrant itself was introduced under the following stipulation:[4]

> ". . . that the warrant for larceny after trust was issued as of August 12, 1961; also that there will be no reference to larceny after trust or any repayment made thereafter to impeach Mr. Bowman's character for candor, truthfulness, honesty, integrity, veracity and general good character; that the only connection in which this larceny after trust will be mentioned is in an attempt to establish possible bias on the part of the witness, Mr. Bowman." (Tr. 611-12)

The Examiner's initial decision clearly sets forth the extreme bias on the part of Bowman which is evidenced from his testimony concerning this matter. (Appellant's Brief p. 23-24)

The undisputed facts are that in August 1961, Mr. Magill swore out a warrant charging Bowman with larceny after trust. The warrant was not prosecuted after an agreement was reached whereby a certain amount of money was withheld from Bowman's salary each week as restitution.

Bowman, at the hearing, claimed he was falsely charged by Mr. Magill for this larceny. In fact, Bowman claimed that it was not he who stole this money, but Mr. Magill, the very person who charged him with the offense (Tr. 534-36), and required Bowman to make restitution by withholding certain monies from his salary at WCGA each week. Despite

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[4] Only a portion of the stipulation is presented in appellee's brief.

this claimed gravest of injustices against him by his employer, Mr. Magill, Bowman claimed that he felt no ill will towards the Magills. He testified as follows:

> "Q. And after many years of loyal service you felt that this was a pretty low-down trick, did you not?
>
> * * *
>
> [Objection by Commission Counsel, overruled]
>
> "A. No, sir. In fact, I worked for the Magills after this incident again. She called me and asked me, or rather she sent Mr. Shuman up to ask me to come to work.
>
> * * *
>
> "Q. And while you were working for them after this incident, were you repaying some of the money that you were alleged to have misappropriated?
>
> "A. I had to repay some that I was responsible for that Mr. Magill took out of my drawer."

On the basis of this testimony, appellee, in its brief (p. 33) makes the fantastic argument that "any possibility of bias raised by this incident was dissipated by the fact that after the warrant had been issued, Bowman was asked to return to work at Station WCGA, by Mrs. Magill, and continued to work there until October 20, 1961."

The Hearing Examiner, on the basis of the same testimony, came to the only reasonable conclusion possible, that Bowman's denial of any bias against the Magills for what he claimed was a false charge against him, is "deemed unworthy of belief," and that while ". . . there may be individuals who have achieved the philosophical stature necessary to forgive such a wrong, this witnesses [sic] demeanor displayed unusual sensitivity and response to real or imagined abuses or implied doubts as to his veracity [emphasis added]." (R. 274)

Although Bowman testified in specific detail about the events surrounding the charge of larceny after trust, he could "not recall" how much money was withheld from his pay by the Magills each week for restitution of his alleged larceny, which charge he claimed was false. The Examiner concluded: ". . . his repeated contention [Bowman's] that he could not recall the weekly payment is deemed to be evasive, and is an example of repeated failures of recollection when his examination developed into areas he did not appear to have anticipated." The Examiner concluded that the above facts concerning the larceny after trust matter, within the ambit of the stipulation, was of use in evaluating Bowman's candor as a witness. (R. 374)

The Review Board did not discuss this most important matter, nor any of the other examples given by the Examiner which clearly and firmly support his conclusion that Bowman was an "incredible" witness whose testimony must be rejected. It merely reversed, without reason, the Examiner's conclusions in this regard (R. 395).

Appellee claims that appellant does not challenge the evidence on which the Board relied. Instead, it claims, appellant "advances an alternate explanation for the conduct of the parties." (Appellee's brief, p. 25) This statement is incorrect. Appellant's brief devotes substantial space to showing that the Review Board, in rejecting the testimony of appellant's and intervenor's six witnesses, in favor of the incredible testimony of the Commission's witness Bowman, considered only a portion of the evidence of record. (Appellant's Brief, pages 35-43) Appellant does not believe it is asking too much to have the Review Board consider all of the evidence of record before reaching its conclusion.

Appellee contends that the form of relief requested by appellant shows a "fundamental lack of merit in appellant's case." This is not so. It is appellant's belief that the form of relief requested would best effect the ends of justice here in light of the Review Board's past actions in this case. The following facts show that from the very beginning of

this case the Review Board has believed as true and relied upon the statements made by the Commission's principal witness, Bowman, despite the most overwhelming evidence that his testimony was incredible:

1. Bowman's first affidavit to the Review Board upon which it relied in adding the "strike application" issue was proved at the Hearing to contain statements of which Bowman had no knowledge (R. 275).

2. At the time it relied upon Bowman's affidavit in adding the "strike application" issue, the Review Board had several affidavits before it from Calhoun, Georgia, businessmen that Bowman's general reputation for truth, veracity, honesty and reliability in the Calhoun community where he lived and worked was, to say the least, not good. (R. 97-110)

3. The hearing examiner, who observed the demeanor of the Commission's principal witness Bowman, concluded that Bowman "displayed malice," "repeated failures of recollection," "a willingness to swear to facts which he believes will aid the cause he has adopted," "utter indifference to the truth or falsity of his oath," and that his testimony was "false," "incredible," "evasive," and "unworthy of belief." The Examiner's conclusions in this regard were supported by substantial, specific findings of fact. The Examiner, who had the superior advantage of hearing and observing this witness also concluded that "Justice would not be served by permitting the ultimate conclusion to rest, even in part, on the testimony of this witness" (R. 276)

4. Aside from the contradictions patently obvious within Bowman's own testimony, no less than four witnesses specifically and unequivocally contradicted Bowman's testimony in several material respects.

5. Despite the most damaging evidence that the Commission's principal witness had given "false" testimony, the Review

Board, without explanation, reversed the Examiner's credibility findings on Bowman and made findings and based its decision principally upon this previously rejected testimony, without explanation, other than to say it was "not bound" by the Examiner's credibility and demeanor findings.

6. The first decision of the Review Board, released on May 7, 1964, devoted more than two pages to invoking so-called presumptions against appellant and intervenor, which were based upon nothing more than conjecture, innuendo and surmise. The Commission, on review, agreed with appellant that the Review Board's use of these "presumptions" was unwarranted and ordered the Review Board to reconsider its decision without their use. (R. 387-88) Within less than two weeks after the case was remanded to the Review Board, it issued an "edited" decision, which was in all essential respects identical with its first decision, except that it had deleted in some measure, its unjustified use of "presumptions" against appellant and intervenor.

7. The above history proves that from the very beginning (in its "grand jury" function) to the very end (in its "review" function) the Review Board, despite overwhelming evidence to the contrary, has believed and relied upon the "false" testimony of the Commission's principal witness, Bowman. Appellant believes that justice would not be served by remanding this case to a body which has evidenced this reliance on and belief in this incredible testimony.

Appellee challenges this court's authority to grant the relief requested (Appellee's Brief, P. 27). That this Court has the power to grant the relief requested by appellant is firmly established. *Administrative Procedure Act*, Sec. 10 (e); *In re United Corporation*, 249 F.2d 168 (3rd Cir., 1957). This case does not present a fact situation which lies with-

in the special province of the Federal Communications Commission for determination, as did the fact situation in *American Broadcasting Co. v. Federal Communications Commission*, 89 U.S. App. D.C. 298, 191F.2d 492 (1951). On the contrary, this case presents an issue of basic law germane to all types of judicial proceedings, namely the power of a reviewing authority to reverse the trier of fact on a question of the credibility of a witness. It is respectfully submitted that this question can be better determined by the wisdom, judgment, and legal experience of a United States Court of Appeals than it can, as has been proved in this proceeding, by the action of the Commission's Review Board which was established in 1962.

Appellee's brief deals at some length with the Commission's historical "concern" with "strike applications." It cites the case of *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1947), to show the long standing history of this "concern." Apparently, the Commission's preoccupation with the matter of strike applications led it to deny substantive legal rights in *Ashbacker, supra*, as it has done here. When the Commission's "concern" about possible violation of one of its policies assumes the level of a fixation which causes it to deny substantive legal rights, the victims of these transgressions, appellant and intervenor here, must rely upon this Court to restore balance to the Commission's decisions and to the scales of justice.

Appellee's statement on page 26 of its brief that appellant's brief "seems to suggest" that the applicant had "only the burden of establishing a prima facie case," is incorrect. At page 33 of appellant's brief it is clearly stated:

> "Appellant has no argument with the statement that the applicant Blue Ridge had the burden of proof under this issue."

Appellee contends that appellant contests only the "form" of the Review Board's decision on the question of burden of proof. Appellant's

brief clearly attacks the substantive reasoning behind the Review Board's decision on this point, and appellant stands on the argument previously made.

If the form which the Review Board chose to use in its decision has resulted in confusion and lack of clarity as to the reasons for its decision, the fault lies with the Review Board, not appellant. And no one else should be charged with clarifying that decision. *Melody Music, Inc. v. Federal Communications Commission,* ___ U.S., App. D.C. ___, _____F.2d _____ (Case No. 18857, decided April 8, 1965)

Respectfully submitted,

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